708 - What Every In-house Counsel Needs to Know About Employment & Labor Law

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Faculty Biographies

Shannon Bagato

Shannon K. Bagato is a general attorney for TTX Company in Chicago. TTX owns one of the nation's largest railcar fleets and is itself privately held by the nation's class I railroads. Ms. Bagato was hired upon graduating from law school as one of TTX's general attorneys and has practiced corporate law with a primary focus on labor and employment, intellectual property, and government affairs.

During her tenure at TTX, Ms. Bagato had the opportunity to work for GoRail, which is a special program of growth options for the 21st century ("Go21"), a non-profit, grass roots organization dedicated to promoting an increased reliance on freight rail transportation. Ms. Bagato was responsible for managing a staff of political organizers and represented GoRail before various industry groups.

Ms. Bagato graduated from Marquette University and received her law degree from The John Marshall Law School.

Kevin Mencke

Kevin J. Mencke is senior counsel, employment and labor of International Paper Co., located at IP global headquarters in Memphis. International Paper is a public global forest products, paper, and packaging company with primary markets and manufacturing operations in the United States, Latin America, Europe, and Asia. The company has approximately 60,000 employees, of whom 42,000 are in the United States. Mr. Mencke is responsible for advising human resources and managers in all aspects of labor and employment law issues, including defending claims before the EEOC, US DOL, NLRB and state FEP agencies, as well as advising global talent acquisition and AAP compliance.

Before joining International Paper, Mr. Mencke practiced in Atlanta with the national labor and employment law firm Ford & Harrison LLP, where he litigated employment law claims in state and federal court, and advised management of companies on all aspects of labor and employment law.

Mr. Mencke is a member of ACC and ABA. He has been a presenter on employment law issues for the Society for Human Resource Management (SHRM), the ABA continuing legal education seminars for other attorneys, and has trained numerous company managers on employment and labor law topics. He is also a co-editor of The Wage and Hour Answerbook by Aspen publishing.

Mr. Mencke earned his undergraduate degree from Emory University and his law degree (with honors) from The University of Georgia School of Law, where he was an editor of the Law Review.

Pilar Schultz

Pilar C. Schultz is an associate general counsel at Biogen Idec, Inc., located in Cambridge, Massachusetts. Her responsibilities include advising and representing Biogen Idec in all aspects of workplace law.

Ms. Schultz has spent the majority of her career exclusively representing employers in employment law matters. Prior to joining the biotech industry, Ms. Schultz practiced in the financial services industry, in Boston, as Investors Bank & Trust Company's in-house employment counsel. Ms. Schultz also represented management in employment law and related litigation as an associate at the Boston office of the national employment law firm of Jackson Lewis LLP. Prior to focusing her practice on employment law, Ms. Schultz was a prosecutor at the State Attorney's Office in Florida.

Ms. Schultz received her B.S. from the University of Florida and her law degree from Stetson University College of law, where she was a member of its Law Review.

Darryl Weiss

Darryl A. Weiss is currently the general counsel and secretary for Telgian, Inc, the parent company of TVA Fire and Life Safety and Fire Materials Group. Telgian offers comprehensive fire protection, life safety, security, engineering, risk management, and loss control services to Fortune 500 companies. His responsibilities include providing legal counsel to the organization and board of directors, merger and acquisition, international law, executive compensation, contracts, IP, employment and labor law, and data privacy issues as well as oversight of licensing, risk management, and human resources.

Prior to joining TVA Mr. Weiss worked in the aerospace, computer, telecommunications, and biotechnology industries in a variety of legal and human resources roles. Mr. Weiss has worked on site in Canada, England, France, Germany, Hong Kong, Ireland, Japan, Malaysia, Netherlands, Singapore, Sweden, and Switzerland.

Mr. Weiss is currently on the board of directors for ACC's San Diego Chapter and is the past chair of ACC's International Legal Affairs Committee.

Kevin J. Mencke
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Employment-at-Will

- Can fire an employee for "good reason, bad reason, or no reason at all"

EXCEPT. . . . . .

Overview

- Part I —Labor Law Issues (NLRA)
- Part II —RIF and Reorganization Issues
- Part III—Federal Employment Laws
- Part IV—State Employment Law Gotcha's

Hypothetical – Part 1

- HR found posted on company bulletin boards the following notice:
  "Come meet with your fellow co-workers on Wednesday at 5:30 p.m., after work, in the cafeteria, to learn about how to improve yourself and your workplace. Snacks provided."
- They also heard that Frank Meddler was seen handing out these meeting notices to employees at the gate and in employee work areas.
- Another employee also forwarded an e-mail sent by Frank to several other employees encouraging them to attend the meeting.
- Interestingly, Frank is the same employee who came alone to HR's office the other day to complain that he and several other employees learned that Suzie Brownose was being paid significantly more money than the rest.
- HR informs you that Frank was disciplined recently for talking about confidential employee pay information with others,
- and HR denied Frank's request to have a co-worker in the meetings investigating and disciplining him over this breach of confidentiality issue.
- HR wants to know if the after hours meeting in the cafeteria is o.k. with legal? Are there any other issues about which you should advise HR?

What issues are raised?

- Solicitation via:
  - Bulletin boards
  - Employee handbilling
  - E-mail
  - Meeting on company premises
- Protected concerted activity
  - One employee?
  - Pay and confidentiality rules
- Employee representation –investigatory interviews

What laws may apply?

- National Labor Relations Act (NLRA)
  - 29 USC §151, *et seq*.
  - Employees within U.S.
  - NLRB
  - ULP's
- Railway Labor Act (RLA)
  - Carriers (railways and airlines)

No Solicitation/No Distribution Rules

- **Solicitation by Employees**
  --Working time, working areas vs. nonworking time, nonworking areas
  - *(NLRA §7--29 USC §157; see pp. 782-785)*
  - Handing out
  - E-mail
  - Bulletin boards
- **Disparate enforcement**
  - *[NLRA § 8(a)(3)--29 USC § 158(a)(3)]*
- **No loitering rules**
- **Solicitation by other than your employees**:
  - Temporary employees or Subcontractors
  - Non-employee Organizers
  - Employees from Other Work Locations

NLRA § 7 Protected Concerted Activity

- What if one employee raises issue for others?
  - In concert with, or on authority of others
    - (29 USC §157; *see pp.785-786)*
    - not just union activity
    - also for "other mutual aid or protection"
    - to affect wages, hours and other terms and conditions of employment.
- Examples:
  - Dangerous working conditions;
  - Criticizing management and company policies during group meeting.

Pay and confidentiality rules

- Chilling employee §7 rights
  - (*29 USC §157; see pp. 787-88*)
  - Prohibit discussing paychecks
  - Any info related to employees
  - Negative conversations
  - Forbid opening paychecks at work
- But does not apply to supervisors
  - [*See pp.769-772)*
- Ledbetter decision may highlight

Representation during investigatory interviews

- Weingarten rights
  - [*Derives from NLRA §7 Rights-29 USC §157; NRLB v. J. Weingarten, Inc.,* 420 US 251 (1975); (*see p. 832)]*
- Unionized vs. non-unionized
- Investigatory vs. disciplinary meeting
- Employer options if assert rights:
  - Discontinue interview,
  - Grant request, or
  - Allow employee option to stop, or continue without representative

Avoid Unfair Labor Practice (ULP) Charges —Follow T.I.P.S:

Section 8(a)1 of NLRA prohibits interference, restraining, or coercion of employees in exercising rights guaranteed in § 7 of NLRA; (see p. 778-781)

- **T**hreats
- **I**nterrogation
- **P**romises
- **S**urveillance (spying)

- "Fairness"

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Hypothetical – Part 2

- After resolving the Frank Meddler issues, HR again contacts you to inform you that it will be necessary to reduce the workforce and terminate the employment of several employees at corporate headquarters. HR also mentions that the company will be closing its manufacturing facility of unionized workers.
- HR seeks your legal advice and guidance as they plan this reduction in force.

REDUCTION IN FORCE
Prepare Written Plan

- Written RIF plan should include:
  - Legitimate, non-discriminatory reasons for the RIF and the employees selected for termination
  - How the company will function during and after the RIF
  - Separation benefits to be offered to the affected employees
  - Transfer/Recall opportunities

REDUCTION IN FORCE
Selection Criteria

- Employee Skills Sets
- Performance Evaluations
- Education/Training
- Length of Service/Seniority
- Other Non-Discriminatory Factors

REDUCTION IN FORCE
Disparate Impact Analysis

- Conducted by Third Party
- Company to Provide Necessary Data of Affected Employees
  - Name, Title, Job Code, DOB, Age, Race, Sex, DOH, Annual Salary, Years of Service

REDUCTION IN FORCE
Alternatives to Involuntary RIF

- Discontinue Temporary/Part-Time Workers
- Voluntary Termination Program
- Early Retirement
- Alternative Work Arrangements
- Unpaid Leave/Furlough
- Reduction/Freeze of Wages, Bonuses, Benefits

REDUCTION IN FORCE
Involuntary Termination Program

- Determine if WARN Triggered
- Review Collective Bargaining Agreements
- Determine Benefits to be Offered
- Review Other Laws
- Consider Immigration Issues
- Obtain Waivers/Releases

WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT

Requires employers to provide employees with notification at least 60 calendar days in advance of plant closings and mass layoffs.

WHEN IS WARN TRIGGERED?

- Plant closing; or
- Mass layoff
  - 500 or more employees, or
  - At least 33% of the active workforce and it represents at least 50 employees

TO WHOM MUST NOTICE BE GIVEN?

- Each affected employee; or
- Union representing the affected employees; and
- The state dislocated workers unit and the head of the unit of local government where the affected facility is located

WHAT MUST NOTICE CONTAIN?

- Name and address of affected site; name and phone number of a company official for further information
- Statement regarding whether the action is expected to be permanent or temporary
- Expected date of first separation and expected schedule thereafter
- Job titles to be affected and names of workers holding those positions
- A statement as to whether bumping rights exist
- Names of all unions representing affected employees and the heads of those unions.

Notice must be **specific**!

HOW IS NOTICE SERVED?

- Any reasonable method of delivery designed to ensure receipt

IS LATE NOTICE PERMISSIBLE?

- There are 3 exceptions to the 60-day notice requirement:
  - Faltering Company Exception
  - Unforeseeable Business Circumstances Exception
  - Natural Disaster Exception
- If an exception applies, notice is required as soon as practicable
  - Must state reason for reduced notice period

FALTERING COMPANY EXCEPTION

- Employer was actively seeking capital or business when the 60-day notice was due
- Realistic opportunity existed to obtain financing or business
- Capital or business must have been sufficient, if obtained, to prevent or postpone closing
- Employer believed reasonably and in good faith that giving the notice would have precluded the obtaining of capital or business

UNFORSEEABLE BUSINESS CIRCUMSTANCES EXCEPTION

- Sudden, dramatic or unexpected action or condition outside employer's control
- Test for determining foreseeability:
  - Whether similarly situated employers exercising reasonable judgment could have foreseen the circumstances causing the layoff.

NATURAL DISASTER EXCEPTION

- Plant closing or mass layoff was a <u>direct</u> result of a natural disaster
  - Flood, earthquake, storm, drought, tidal wave

DAMAGES

- Liable to each aggrieved employee for:
  - Back pay for each day of violation at the higher of:
    - The average rate received over the last 3 years, OR
    - The final regular rate received, AND
  - Benefits that would have been received
- Up to $500/day to the unit of local government not notified
- Possibly attorney's fees

WAIVERS & RELEASES

- Release of ADEA claims must:
  - Be knowingly and voluntarily executed
  - Be written in understandable terms
  - Specifically refer to claims under ADEA
  - Not extend to claims that arise after release executed
  - Offer consideration unrelated and in addition to whatever the individual is entitled to receive under existing company policies

OLDER WORKER BENEFIT & PROTECTION ACT

- In a "group" situation, employees age 40+ are given at least 45 days to consider release
- Documentation to Affected Employees
  - Job titles/ages of individuals selected for program;
  - Ages of all individuals in same decisional unit who are not selected;
  - Time frame for termination
  - Eligibility factors

CONCLUSION

- Treat employees fairly
- Inside counsel play a very important role in coordinating and facilitating reductions in force and plant closings.

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Hypothetical – Part 3

- Just when you think you have resolved the plant closing issues, HR leaves you a voicemail message giving you a "heads up" that they are planning to terminate Lucy Goose the next morning. Lucy is a long standing employee that has had ongoing performance and attendance problems since the birth of her first child. Her priorities have simply changed and her manager has had enough. Lucy and her manager seem to have a "personality conflict" and it's just not going to work out. It is all very well documented, the HR rep reports. This is just an "FYI" as there really aren't any "legal" issues involved. Keeping the employee would just be too big of a financial risk for the company. They feel bad for Lucy, but her husband has a good job so they are sure it will all work out in the long run.

- EEOC Enforcement Guidance:

Unlawful Disparate Treatment of Workers with Caregiver Responsibilities

Q: When does discrimination against a worker with caregiving responsibilities constitute unlawful disparate treatment?

- A: Unlawful disparate treatment arises where a worker with caregiving responsibilities is subjected to discrimination based on a protected characteristic under federal EEO law. Generally, this means that, under Title VII of the Civil Rights Act of 1964, unlawful disparate treatment arises where a caregiver is subjected to discrimination based on sex and/or race.
- Unlawful disparate treatment of a caregiver also can arise under the Americans with Disabilities Act of 1990 where an employer discriminates against a worker based on his or her association with an individual with a disability.

Q: What are some common circumstances under which discrimination against a worker with caregiving responsibilities might constitute unlawful disparate treatment under federal EEO law?

- The new enforcement guidance illustrates various circumstances under which discrimination against a caregiver might violate federal EEO law. Examples include:
- Treat male caregivers more favorably than female caregivers: Denying women with young children an employment opportunity that is available to men with young children.
- Sex-based stereotyping of working women:
  - Reassigning a woman to less desirable projects based on the assumption that, as a new mother, she will be less committed to her job.
  - Reducing a female employee's workload after she assumes full-time care of her niece and nephew based on the assumption that, as a female caregiver, she will not want to work overtime.

Continued

- Discrmination against women of color: Reassigning a Latina worker to a lower-paying position after she becomes pregnant.
- Stereotyping based on association with an individual with a disability: Refusing to hire a worker who is a single parent of a child with a disability based on the assumption that caregiving responsibilities will make the worker unreliable.
- Hostile work environment affecting caregivers:
- Subjecting a female worker to severe or pervasive harassment because she is a mother with young children.
- Subjecting a female worker to severe or pervasive harassment because she is pregnant or has taken maternity leave.
- Subjecting a worker to severe or pervasive harassment because his wife has a disability.

Continued

- Subjective decisionmaking: Lowering subjective evaluations of a female employee's work performance after she becomes the primary caregiver of her grandchildren, despite the absence of an actual decline in work performance.
- Assumptions about pregnant workers: Limiting a pregnant worker's job duties based on pregnancy-related stereotypes.
- Discrimination against working fathers: Denying a male caregiver leave to care for an infant under circumstances where such leave would be granted to a female caregiver.

- Americans with Disabilities Act

- Family Medical Leave Act

- TITLE VII
  - Race, Color, Religion, Sex, National Origin
  - Harassment
  - Retaliation
- ADEA (Age Discrimination in Employment Act)
  - Over 40

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Part 4--"Special Rules"

- Many states have their own set of "gotcha" rules

Final Pay

Your California operation tells you that a manager has turned in his two week notice and after a counseling session this Friday they are going to terminate a performance issue employee. Finally, one employee just stormed off the job. (it wasn't clear if it was in a huff or righteous indignation)

Break-Meal Periods

- Your admin wants to attend her child's soccer game at 4:00. To do so she asks if she can work through lunch and leave an hour early to make it to the game.
- (Apparently he *CAN* bend it like Beckham)

Withholding From Final Checks

- An employee has resigned. They have previously signed a promissory note to repay the legal fees for their immigration processing and will owe approximately $2,000 on their last day.

References

- **2007 State by State Guide to Human Resources Law** -
- Trends and Controversies in Human Resources Law
- Defining the Employment Relationship
- Fair Employment Practices
- Wages, Hours, and Holidays
- Employment at Will
- Benefits
- Unemployment Compensation
- Workplace Privacy
- Health and Safety
- Summary of Federal Legislation, Guidelines, and Policies on Human Resources Law
  Glossary of Legal Terms
  Index
- www.aspenpublishers.com

Other "Gotchas"

- Prepaid Healthcare Act – HI
- Domestic Violence
- Jury Duty
- Living Wage
- FMLA type laws

"NLRA's Impact On The Workplace
(Campaigns, Preventative Maintenance
And Unfair Labor Practices)"

and

"Coping With Unions"

Excerpts from
Ford & Harrison's 2007 *SourceBook*

Atlanta • Asheville • Birmingham • Chicago • Dallas • Denver • Jacksonville • Los Angeles • Melbourne • Memphis • Miami • Minneapolis • New York • Orlando • Phoenix • Spartanburg • Tampa • Washington, DC

Chapter Twenty-Five

NLRA'S IMPACT ON THE WORKPLACE

(CAMPAIGNS, PREVENTATIVE MAINTENANCE
AND UNFAIR LABOR PRACTICES)

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NLRA'S IMPACT ON THE WORKPLACE

(CAMPAIGNS, PREVENTATIVE MAINTENANCE AND UNFAIR LABOR PRACTICES)

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I. OVERVIEW OF THE LABOR LAWS

A. The National Labor Relations Act (NLRA). The NLRA, 29 U.S.C. § 151, *et seq*., is the primary federal law governing the relationship between employers and unions (other than employers who are carriers as defined by the Railway Labor Act (RLA) discussed below). Since its enactment, the NLRA has been amended by several acts, including:

- **The Wagner Act.** (Establishing the National Labor Relations Board (NLRB) and prohibiting employer unfair labor practices.)
- **The Taft-Hartley Act.** (Among other things, creating union unfair labor practices; permitting states to prohibit union shops; establishing a one-year waiting period from the time of a valid election for subsequent elections to be held in the same or any subdivision of that bargaining unit; and excluding supervisors from NLRA.)
- **The Labor-Management Reporting and Disclosure (Landrum-Griffin) Act (LMRDA).** (Requiring, among other things, that unions make financial reports each year to the Department of Labor (DOL) disclosing a number of categories of income and disbursements and adopt a constitution and bylaws; amending § 8(b)(4) of the Act (prohibiting employer unfair labor practices); adding § 8(b)(7), which limits union picketing for recognitional or organizational purposes; adding § 8(e), which prohibits hot cargo agreements, *i.e.*, an agreement whereby the employer agrees to refrain from dealing in the products of another employer or cease doing business with another person; adding § 8(f) to permit the execution of prehire agreements among building and construction employees; and clarifying the Act to ensure that economic strikers, even if they have been replaced, still have a right to vote. It also repealed §§ 9(f), 9(g), and 9(h) regulating labor organizations.)

NLRB Jurisdiction. The Third U.S. Circuit Court of Appeal has held that the NLRA does not apply outside the territorial jurisdiction of the United States; therefore, the NLRB does not have jurisdiction over employees working outside of the United States. *See Asplundh Tree Expert Co. v. NLRB,* 365 F.3d 168 (3d Cir. 2004).

B. Railway Labor Act (RLA). The RLA was originally passed in 1926 and governs the relationship between carriers (railways and airlines) and their employees. It provides a completely different structure for the resolution of disputes than envisioned by the later NLRA. It provides machinery for settlement of major and minor disputes and imposes substantial limitations on the ability of the parties to resort to economic action prior to substantial mediation. It also provides for a presidential board with authority to mediate contract negotiations and provides for a cooling-off period if needed. The RLA also provides a basis for airline employees to seek to unionize. Additionally, where the employees are represented by an incumbent representative, a fifty percent plus one showing of interest is needed. Employees do not vote "yes" or "no" as they do under the NLRA. Instead the National Mediation Board mails out ballots to eligible voters. If a majority of employees do not return their ballot, the union has been

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defeated. If a majority of employees do return their ballot, then the representative selected by a majority of those who return their ballots prevails. For more information regarding the RLA, see the *Railway Labor Act* and *Interaction Between the RLA and Other Laws* Chapters of the SourceBook.

C. Sherman Anti-Trust Act and Clayton Act. Unions do not have an automatic exemption from antitrust violations. *See Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). A federal judge in California has held that a revenue-sharing agreement among supermarket chains signed to counter an anticipated strike and picketing by union workers was not protected from potential antitrust liability by a nonstatutory exemption courts have extended to certain conduct by businesses involved in labor disputes. *See California ex rel. Lockyer v. Safeway, Inc.*, 371 F. Supp. 2d 1179 (C.D. Cal. 2005). In this case, the state of California filed a complaint alleging four supermarkets engaged in an unlawful combination and conspiracy in restraint of interstate trade and commerce in violation of the Sherman Act when they entered into a mutual strike assistance agreement (MSAA) in which they agreed, among other things, to share revenue in the event of a strike. The defendants claimed the MSAA is not subject to anti-trust challenge because it is related to their participation in multiemployer collective bargaining and thus falls within the nonstatutory labor exemption to the antitrust laws. The court held that the MSAA was not sufficiently connected to the collective bargaining process and, thus, was not exempt from anti-trust laws.

II. WHY EMPLOYEES SEEK UNIONIZATION AND HOW

A. Basis for Unionization. According to the Bureau of National Affairs, while the number of representation elections held by the NLRB in 2004 decreased slightly from the previous year, the win rate of unions continued to increase for the eighth consecutive year. *See Number of Elections Decreased in 2004: Union Win Rate Increased for Eighth Year,* Daily Lab. Rep. (BNA), No. 84, at C-1 (May 3, 2005). Unions have won a majority of representation elections every year since 1996. *Id.*

What does this mean for employers? Unions are becoming more effective in their organizing efforts. Unions are using increasingly sophisticated and aggressive techniques to attack employers on a broad range of fronts. Additionally, unions are targeting employers in virtually every industry and targeting all types of employees, with a special emphasis on women and immigrant workers.

Understanding the causes of unionization is essential to preventing union organizing drives. In many instances, the lead organizer among the employees is an employee with definite leadership and supervisory qualities whose talent management has failed to recognize. A program aimed at preventing or eliminating causes of unionization may also improve or eliminate other labor and employment problems.

Employees may seek unionization for any of the following reasons:

1. Poor Supervision. Characteristics and causes of poor supervision include: subjective methods of selecting supervisors; lack of training in human relations; supervisors who "play favorites"; and supervisors who are neglected by upper management and become bitter, passing that bitterness on to the employees. Supervisors with poor management skills may be inconsistent, reactionary, silent, or harassing. Any of these characteristics can easily lead to employee dissatisfaction. Additionally, a poor organizational structure can lead to employee dissatisfaction. Employers should clearly define who is the boss. Employees who feel they've been treated harshly or unfairly by supervisors may want to "get even" with management by seeking unionization.

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2. Failure to Communicate. Improper responses to employee ideas, such as belittling the ideas, can create or add to employee dissatisfaction. Poor upward and downward communications can also lead to employee dissatisfaction. Communication barriers in upward and downward communication include: (a) a lack of a communication policy; (b) an authoritarian climate in the company; (c) a past record of failure to keep promises; (d) timid or indifferent management; (e) decentralization, *i.e.* multi-plant companies; (f) poorly described management responsibilities and authority; (g) multiple levels of management; (h) overloaded managers (i); fear of supervisors; (j) insufficient equipment; (k) use of the wrong media; (l) size of the company; (m) management mindset – jealousy, fears, and prejudice; (n) failure to understand employees' real interests; (o) lack of confidentiality of complaints, retaliation by supervisors and co-workers; and (p) failure of supervisors to pass complaints upward due to fear of "losing face."

3. Failure of Management to Keep Employees Informed. When appropriate, employees should be informed about changes in operations, new equipment obtained, elimination of certain operations, or fluctuating sales or profitability. If management does not keep employees informed, a credibility gap may develop between the facts and employees' perceptions. Keeping employees informed gives employees the opportunity to become involved in management decisions where appropriate, which can help bolster employees' pride and sense of involvement in the workplace.

4. Retention of Poor Employees and Perceptions of Favoritism. Poor employees may be unqualified, marginal, or overqualified and their retention may cause resentment among their co-workers. In dealing with poor employees, the employer should train, improve, or terminate the employee. If an employee is overqualified for the position held, the employer should find the employee another position, give the employee more responsibility, or possibly discharge the employee. Perceptions of favoritism in discipline or promotions may also lead to employee dissatisfaction.

5. Wage and Benefits Structure and Rules or Policies. Employee dissatisfaction may stem from wages and benefits that are not competitive and from wage inequities. Unequal or inconsistent rules or policies leave employees frustrated because employees feel that management has broken an implied contract of fair dealing. Employers should implement a mechanism for listening to employee complaints.

6. Job Security. Employees who perceive they lack job security may be more likely to unionize.

B. Preventative Maintenance. Timing is key. An employer needs time to audit known problems and institute corrective action, institute a complaint/grievance procedure, train supervisors, and establish an open line of communication within the organization. Employers can gain time by instituting stop-gap measures to take care of immediate problems. These measures may include an education program, adoption of a position on unions, and security rules.

Institution of a comprehensive education program with front line supervisors is important because unions will exploit ignorance. Additionally, some managers never learned good management skills while others need to be reminded and need to have their management style retooled for consistency. It is important that managers and front-line supervisors know their rights and know how to react in certain situations. The key to defeating union organization is to take swift and decisive action. An employer can do this only if managers and supervisors already understand their rights. They need to know the areas to watch, the danger signs of union activity, the employer's position on unions, the employer's rights, key factors in treatment of personnel that create union interest, what they can and cannot do or say, and how the union organizer works so they can counter his or her sales techniques on a daily basis. Additionally, managers need to

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know about unions in general, how to dispel an employee's fear of rejecting unions, what to do if the union business agent demands recognition or offers authorization cards for examination, what constitutes protected concerted activity, and their stake in remaining nonunion.

C. Preventative Maintenance: Security Steps. Employers should safeguard employee lists and should not circulate lists of employees' names and addresses. Consider not putting names on time cards – instead use partial names or numbers. Employers should also safeguard Rolodex listings in offices and limit access to other such listings, safeguard waste materials, and ensure that all computer lists are password-protected.

1. No Solicitation/No Distribution Rules. A union organizing effort by employees usually takes place on the employer's premises. Union organizing can begin with union representatives or employees securing employee signatures on authorization cards. This activity is considered solicitation of signatures, not distribution of cards. It can only be prohibited during an employee's working time. An employer may restrict organizing activities by employees on its property when it has a valid no solicitation/no distribution rule and no loitering rule. A no solicitation rule prohibits employees from soliciting, whether for the union, sick employees, football lotteries or other reasons, when they are supposed to be working or on the employees' "working time." *See Our Way, Inc.*, 268 N.L.R.B. 394 (1983). Such a rule cannot prohibit employees from engaging in union solicitation during break periods, meal-time, and other specified periods during the work day when employees properly are not engaged in performing their work tasks, even if employees are paid during these periods. An employer may also implement a "no distribution rule" that prohibits employees from distributing literature or other material in the working areas at any time. See the discussion below for more information on no solicitation/no distribution rules.

2. Management Parking. To enable an employer to become aware at the earliest possible moment of any union organizing activity, managers should park their cars in the same area as the employees. If managers park at a separate location, union literature that is passed out and placed on cars may not come to the employer's attention. Reserved management parking also sends an undesirable "we/they" message to employees.

3. No Trespass Rule. An employer may restrict solicitation by nonemployees on its property (no trespass rule); however, it may not enforce the no trespass rule only against union organizers. Such a rule must be enforced nondiscriminatorily. In certain retail and other businesses where the public has access to the employer's premises, other rules govern whether an employer may exclude union organizers from its property. For example, in a hospital setting, generally an employer may exclude nonemployee union organizers only from patient care areas.

4. Loitering/Access Rule. An employer may restrict access of off-duty employees to the employer's property. A no loitering/no access rule is also designed to keep employees from clocking in early or staying late after clocking out and therefore has a wage/hour preventive maintenance purpose as well. If the employer adopts such a rule, the rule must be limited to the interior of the facility and other working areas and must be clearly disseminated to all employees. Additionally, the rule must apply to all off-duty employees seeking access to the premises for any purpose and not just to those employees engaging in union activity.

A rule that denies off-duty employees entry to parking lots, gates, or other outside nonwork areas may be found invalid absent substantial business justification. *Tri-County Medical Center*, 222 N.L.R.B. 1089 (1976).

5. Supervisors' Breaks. Supervisors should be encouraged to take their breaks and eat their lunch with employees. If supervisors begin this practice before a union organizing drive starts, they may continue to do so during a union organizing drive even though it prevents

employees from soliciting or distributing for the union. If started during an organizing drive, it could be viewed as illegal surveillance.

6. Labor Relations Education. The employer must conduct an educational program. All managers and supervisors should be brought in to one location for this program. Meeting at one location is essential to enable the employer to obtain input from different locations to determine its current status and to implement the program with the minimum number of problems. This method will also help establish the necessary security rules and provide information to management.

D. Preventative Maintenance: Bulletin Boards. If the employer allows employees to use its bulletin board for other purposes, it may have to allow employees to post notices of union meetings and other matters. *See NLRB v. V&S Schuler Engineering, Inc.,* 309 F.3d 362 (6th Cir. 2002) (employer committed a ULP when it removed employee postings from an employee bulletin board and refused permission to make similar postings). An employer may adopt a rule prohibiting any employee postings on its bulletin boards, but such a rule should be carefully considered weighing positive and negative employee-relations issues.

E. Preventative Maintenance: Short Range Action Generally. This step provides the means to uncover any problem that could lead to union interest and correct it before the employer becomes the target of a union organizer. This step also provides tangible results for employees, such as an internal, problem-seeking audit; a complaint procedure; the development of upward communications through a "sensing" program; and supervisory training to ensure fair treatment and adequate supervision of employees.

1. Internal Problem-Seeking Audit. An internal problem-seeking audit is the first positive step toward negating any need for a union. The employer should schedule individual meetings with employees, supervisors, and an additional meeting with a neutral third party such as labor and employment counsel to assess the company's union vulnerability. Assure confidentiality and ask the employees and supervisors what is wrong and right with management. Evaluate employees' perception of management and the workplace. Ask which employee needs are met and which are not. Focus on operational issues that employees raise or perceive. Review the results of the interviews for consistent themes in perceived employee problems. Present the results to higher management, while maintaining employee confidentiality. Management should then determine an immediate action plan designed to provide solutions to problems uncovered.

Inform employees about actions the company has or will take or why actions are being delayed. Seek solutions from employee workforce.

Note that any internal problem-seeking audit should not be initiated after the employer becomes the target of an organizing campaign because this could be viewed as an unlawful solicitation of grievances if there is a perception that a union is not necessary to resolve problems. *See NLRB v. V&S Schuler Engineering, Inc.,* 309 F.3d 362, 370-71 (6th Cir. 2002) (noting that the solicitation of grievances itself is not an unfair labor practice, but an employer who has not previously solicited grievances and begins to do so in the midst of an organizing campaign creates a compelling inference that the employer is implicitly promising to correct the problems, which may violate § 8(a)(1)); *Wal-Mart, Inc. and United Food & Commercial Workers International Union, Local 1167,* 339 NLRB No. 153 (Aug. 21, 2003) (Wal-Mart did not commit an unfair labor practice by sending higher level managers to spend time with employees to listen to and address their job-related concerns during a unionization effort because the company had a long-standing policy of doing this before the unionization drive began; since Wal-Mart's program existed before the union organizational campaign, conducting the program during the campaign did not violate the NLRA).

2. Complaint Procedures. Establish a complaint procedure that allows employees to air their complaints. Most union support flourishes in an environment that ignores employee complaints. Inform employees in writing of the philosophy underlying the complaint procedure. Employees should understand that there will be misunderstandings and that management will make mistakes and that the complaint procedure policy is implemented out of dignity and respect for employees and so that there will be no impediments to their ability to perform their job. The policy should provide a standard procedure to review decisions with which employees disagree.

A complaint procedure should be simple and easy to use. The purpose of the policy is to solve problems, not prevent them from being raised. While it is important to support supervisors, it is also important to treat employees fairly. If supervisors make unwise decisions, these decisions should be reversed in a manner consistent with maintaining the credibility of the supervisor involved.

Steps of procedure should not be set in stone and should include an "open door" policy to top management. The purpose of the complaint program is to make sure employee complaints reach top management so the employer can take corrective action before the employees turn to a union.

III. INITIAL UNIONIZATION ATTEMPT

A. Typical Union Strategy. A union must get thirty percent of employees in an appropriate unit to sign authorization cards before it can file a petition with the NLRB. However, unions rarely file petitions when only thirty percent of the employees have signed union cards. Unions rarely gain strength during an effective management campaign. In a right-to-work state in particular, if only a small number of employees are going to join the union, it makes no economic sense to unionize that employer.

1. *"Salting."* Unions will attempt to find the natural leaders to spearhead their drive or insert their own. "Salting" occurs when paid union organizers attempt to obtain jobs at a union free workplace so they can organize from within. According to the NLRB, it is an unfair labor practice (ULP) to refuse to hire an applicant for employment because she or he may also be a paid union organizer even though the organizer, if employed, would be an employee of both the employer and the union.

In *NLRB v. Town & Country Elec.*, 516 U.S. 85 (1995), the U.S. Supreme Court held that an employer may not lawfully refuse to hire paid union organizers based solely on the inherent conflict of interest when a union official applies for a position only to further the union's objectives. Except for legitimate business reasons, employers may also not legally refuse to hire employees who designate themselves as union supporters during the application process.

In *FES (a Division of Thermo Power)*, 331 N.L.R.B. No. 20 (2000), *enf'd,* 301 F.3d 83 (3d Cir. 2002), the Board set forth an analytical framework to be used when an employer is accused of refusing to hire or consider applicants because of their union affiliation. In a refusal-to-hire case, the General Counsel must show that: (a) the employer was hiring or had plans to hire when it refused to hire the applicants; (b) the applicants had experience or training relevant to the requirements of the position, or the employer had not adhered to the requirements for the position, or the requirements were a pretext for discrimination; and (c) the employer's antiunion feelings contributed to the decision not to hire the applicants. If the General Counsel meets this burden, the employer must show that it would not have hired the applicants regardless of their union affiliation. *FES,* 331 N.L.R.B. No. 20, at 6; 301 F.3d at 87. *See also Masiongale Electrical-Mechanical v. NLRB,* 323 F.3d 546 (7th Cir. 2003) (approving the NLRB's burden-shifting framework described in *FES* in refusal-to-hire cases).

To establish a refusal-to-consider violation, the General Counsel must show that: (a) the employer excluded the applicants from the hiring process; and (b) the employer's antiunion feelings contributed to its decision not to hire the applicants. If the General Counsel meets this burden, the employer must show that it would not have considered the applicants regardless of their union affiliation.

In *Fluor Daniel, Inc. v. NLRB*, 332 F.3d 961, 968-69 (6th Cir. 2003), *cert. denied,* 125 S. Ct. 964 (2005), the Sixth Circuit upheld the NLRB's determination that the employer committed an unfair labor practice by refusing to hire a number of paid union organizers, but held that the standard set forth in *FES* for refusal-to-consider claims, as applied in *Fluor Daniel* by the NLRB, conflicted with Sixth Circuit case law, which specifically held that violations of § 8(a)(3) can only occur when an employer is hiring for the position(s) at issue. The Sixth Circuit stated that "in order to prove a violation of § 8(a)(3), the General Counsel needs to show (1) that there is antiunion animus, and (2) the occurrence of a covered activity, for example a particular discharge or a particular failure to hire." *Id.* at 975 (citing *NLRB v. Fluor Daniel,* 161 F.3d 953 (6th Cir. 1998) (*Fluor Daniel II*)). Once the General Counsel proves these elements, the employer must show that the employees in question would not have been hired or considered even in the absence of their union affiliation. *Id.* The court restated dicta from *Fluor Daniel II,* "[t]here is no interference with, restraint, or coercion of applicants in the exercise of their protected rights when an employer, even with antiunion animus, rejects applicants who are in fact unqualified or for whose particular services the employer simply has no need," and remanded the case to the NLRB to determine whether, as required for a violation of § 8(a)(3), there were jobs available for the five applicants for whom the NLRB found failure to consider violations. *See also Kelly Construction of Indiana, Inc.*, 333 NLRB No. 148 (2001) (the employer's reasons for refusing to hire twenty-seven union applicants, which included a preference for employees accustomed to earning the wages it would pay for the positions sought, were legitimate reasons for not hiring the applicants).

When paid union organizers are illegally denied jobs based upon their union affiliation, the Board may award "make whole remedies," including back pay. *See Ferguson Electric Co.*, 330 N.L.R.B. No. 75 (2000) (a paid organizer who was denied a job based on his affiliation with a union was entitled to back pay for the job he should have been offered; the pay he received from a union did not reduce his potential damages award), *aff'd, NLRB v. Ferguon Electric Co.*, 242 F.3d 426 (2d Cir. 2001).

NLRA Pre-empts Employer's Claims Against "Salts." A Minnesota appeals court has held that an employer's state law claims against a union organizer who failed to disclose his previous union activity were pre-empted by the NLRA. *See Wright Elec. Inc. v. Ouellette,* 686 N.W.2d 313 (Minn. App. 2004), *cert. denied*, 125 S. Ct. 2936 (2005). Wright hired Ouellette in 1992, but later fired him when it discovered he failed to disclose prior misconduct on his application and that he was a union organizer who previously worked for union contractors. Subsequently, Wright sued in state court, claiming Ouellette breached his at-will employment contract and that the union's actions were part of a pattern and practice of fraud to accomplish unlawful objectives. Ouellette and the union moved for summary judgment contending the NLRA preempted Wright's state law fraud and related claims. The district court denied the motion, and Ouellette and the union appealed.

The Minnesota Court of Appeals reversed, finding the National Labor Relations Board and federal courts have upheld union salting activities. "With some key exceptions, the NLRA also protects a union member's right to misrepresent his or her employment history in order to conceal union status when seeking employment in a nonunion workplace," the court said. The Minnesota Supreme Court denied Wright's petition for review and the U.S. Supreme Court denied Wright's petition for certiorari.

2. Other Strategies. In addition, unions are now using alternative tactics known as comprehensive campaigns, corporate campaigns, or strategic approaches to achieve their goals.

a. Corporate Campaigns. A corporate campaign is an attack by a union on the ability of a company or industry to conduct its routine business. The objective is to generate so much pressure on the targeted company that it will give in to the union's demands. *See* Jarol B. Manheim, *Trends in Union Corporate Campaigns, A Briefing Book,* The George Washington University, The U.S. Chamber of Commerce (2005). Typically, the role of a corporate campaign is to force management to accede to union demands for card check and neutrality agreements – a process by which union certification procedures administered by the Board are effectively circumvented. *Id.* Some of the trends that have developed from the use of corporate campaigns include:

- Increasing, strategic use of shareholder resolutions and proxy voting to pressure directors and senior management;
- Continued development of infrastructure to support corporate campaigns and a growing number of professionals whose primary job is to plan them;
- Increasing numbers of multi-union attacks on individual companies;
- Rapid expansion of networks and coalitions of nonunion allies that advance and legitimize union attacks on companies, both in the U.S. and internationally;
- An increase in the use of corporate campaigns for political, policy or ideological purposes, rather than for employment purposes.

Id.

Corporate campaigns essentially use what is known as a power structure analysis – that is, an attempt to polarize the entire corporate and financial community away from the primary target, putting ever increasing pressure on the target. *Id.* Corporate campaigns will focus on the following relationships in the power structure analysis: employees; shareholders; boards of directors; regulators and legislators; community leaders; media and the public; customers; and bankers and creditors. *Id. See also UFCW Changing Wal Mart Organizing Tactics; Moves Away from Focusing on Single Stores*, Daily Lab. Rep. (BNA), No. 65 at A-1 (April 6, 2005). Similar tactics are also being used after the union gains recognition. Unions consider these tactics less costly than a strike or walkout, in which case the union would be required to pay strike benefits.

b. State Union Neutrality Laws. Union neutrality laws can be powerful tools in the union's hands during an organizing campaign because unions can file suit under these laws during a campaign, thus diverting the employer's attention and resources. They also hamper an employer's ability to provide important information to employees regarding the unions.

The Ninth Circuit has upheld California's union neutrality law, finding is it not preempted by the NLRA. *See Chamber of Commerce of the United States v. Lockyer*, 463 F.3d 1076 (9th Cir. 2006). This law prohibits employers from using money received from the state to deter union organizing. The neutrality law, AB 1889 (found at California Government Code §§ 16645-16649) was enacted to express California's policy to remain neutral with regard to union organizing.

One provision bars private employers who receive a grant of state funds from using the funds to assist, promote, or deter union organizing. Another provision bars a private employer receiving state funds in excess of $10,000 in any calendar year on account of its

participation in a state program from using program funds to assist, promote, or deter union organizing. The statute expressly specifies as prohibited "any expense, including legal and consulting fees and salaries of supervisors and employees, incurred for research for, or preparation, planning, or coordination of, or carrying out, an activity to assist, promote, or deter union organizing."

Employers covered by the statute who make such expenditures must maintain records showing that state funds have not been used for those purposes. If the employer commingles state and private funds, the state will presume that any expenditure to assist, promote or deter organizing came in part from state funds.

Remedies for violating the neutrality law include returning the state funds used for the prohibited purpose, civil penalties, attorney fees and costs.

The law was challenged by several employer groups, including the Chamber of Commerce of the United States, who sought to have the law declared invalid after unions began filing complaints and lawsuits during union organizing campaigns claiming employers were violating the law. In holding that the statute is not pre-empted by the NLRA, the Ninth Circuit used two tests that the U.S. Supreme Court has established to determine when a state law is pre-empted.

Machinists Pre-emption*:* Under the Machinists test (which is based on *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Commission,* 427 U.S. 132 (1976)), a state law is pre-empted if it regulates activity that Congress intended to be free from all regulations. The court held that the neutrality law does not relate to an area Congress intended to remain unregulated and governed by free market forces, but instead relates to the way in which recipients of state funds use the funds. The court noted that that the state's choice of how to spend its funds is not controlled by the free play of economic forces.

Garmon Pre-emption*:* The court also held that the neutrality law is not pre-empted under the Garmon test (based on *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)). Garmon pre-emption arises when there is an actual or potential conflict between state regulation and federal labor law due to state regulation of activity that is actually or arguably protected or prohibited by the NLRA. Section 8(c) of the NLRA protects employer speech and allows employers to express their opinions about unions as long as the speech does not contain a threat of reprisal or promise of benefit. The court held that § 8(c) of the NLRA does not grant free speech rights to the employer; it merely prohibits the use of the employer's noncoercive speech as evidence of an unfair labor practice. Because the court found no affirmative free speech right granted by the NLRA, Garmon pre-emption did not apply to the statute based on its effect on an employer's ability to speak out against unionization.

Thus, the court found that the law is not pre-empted under either of the tests used by courts to analyze this issue. The plaintiffs have filed a motion to stay issuance of the mandate to maintain the status quo pending a petition for writ of certiorari to the United States Supreme Court.

California is not the only state with a union neutrality law. The Second Circuit has reversed a lower court's determination that a similar New York law is pre-empted under the *Machinists* test. *See Healthcare Ass'n of New York State v. Pataki*, 2006 U.S. App. LEXIS 29857 (2d Cir. Dec. 5, 2006). The lower court granted summary judgment on claims challenging the law, relying extensively on an earlier version of the Ninth Circuit decision in *Lockyer*. The Second Circuit reversed this decision, finding there are factual issues that preclude summary judgment on the issues of Garmon and Machinist

preemption. Accordingly, the court remanded the case to the lower court for further consideration.

B. The Demand for Recognition. Once the union obtains the number of cards it is seeking, it will usually make a demand for recognition upon the employer. Most unions make a demand upon the employer and file a petition with the NLRB after they have secured a majority of the employees' signatures on union cards. Unions sometimes visit an unsuspecting employer in an attempt to gain voluntary recognition or get the employer to make a mistake, such as looking through the cards.

An employer is entitled to an election unless the employer forfeits this right by the commission of outrageous and pervasive ULPs or other numerous ULPs or when the employer has agreed to an alternative method of determining the union's majority status. *Sullivan Electric Co*., 199 N.L.R.B. 809 (1972), *enf'd*, 479 F.2d 1270 (1973); *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).

1. Card Check. An employer may be bound to recognize and bargain with a union when it has agreed to forego its right to have an election. Such a finding can be made based upon a card check or a poll of employees. *Sullivan Electric Co*., 199 N.L.R.B. 809 (1972), *enf'd*, 479 F.2d 1270 (6th Cir. 1973). An employer is not obligated to agree to a card check or a poll or any other alternative method of determining a union's majority status. *Linden Lumber* 419 U.S. at 301. *See also International Union of Operating Engineers v. NLRB and Terracon, Inc*., 361 F.3d 395 (7th Cir. 2004) (employer does not implicitly recognize a union by simply reviewing authorization cards and then stating that the union has collected them from all of the potential bargaining unit, where there is no clear agreement to waive the right to an election); *Jefferson Smurfit Corp. v. IBEW Local 177*, 331 N.L.R.B. No. 80 (2000) (employer did not waive the right to an election even though the company's employee relations manager read a letter from the union requesting recognition and examined and copied authorization cards presented by the union; an employer has the right to an election to resolve the issue of majority status and, absent a clear agreement to forego that right, does not violate § 8(a)(5) by insisting upon an election).

An employer should not examine union authorization cards since the Board could construe this as an agreement to a card check, or, at the very least, the employer will be construed to have knowledge of who has engaged in union activity. If any card signer is discharged, the card signer will have the ability to claim the discharge was because of having signed a union card. Additionally, some unions identify their in-plant organizers to the employer so that if these employees are discharged the employer cannot claim it was unaware that the employees were engaged in union activity.

2. Neutrality Agreements. A neutrality provision provides that an employer will not actively campaign against a union seeking to represent its employees. Such an agreement may require the employer to provide a union with a list of its employees' names, addresses, and even telephone numbers, as well as allowing the union open access to the employer's worksite to communicate with the targeted employees.

3. Why Not Agree to a Card Check/Neutrality Pact?

- Card checks do not accurately reflect the free will of the targeted employees.
- Unlike a secret ballot election, employees often sign union cards in the presence of a union organizer or another pro-union employee.
- Employees may sign a union card for reasons other than support for the union. For example, certain employees may sign cards because they believe the cards will be

used only to obtain a NLRB election, when in fact, the union intends to use the cards to get a majority for a card check or in-person demand for recognition.

- A union may claim to represent employees in an appropriate bargaining unit based on evidence that the NLRB would deem insufficient to make such a showing.
- Without NLRB intervention, a union may seek to represent a group of employees who would not constitute an appropriate unit under traditional NLRB standards.

Corporate campaigns often have the goal of pressuring the employer into agreeing to a card check along with a neutrality provision because the union is significantly more likely to be successful in recruiting members than when using traditional NLRB election procedures. *See,* Jarol B. Manheim, *Trends in Union Corporate Campaigns, A Briefing Book,* The George Washington University, The U.S. Chamber of Commerce (2005).

4. Employer ULPs. If an employer has committed numerous ULPs, it may be required to bargain with a union. *See NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969). Even if a union decides to proceed with an election despite employer ULPs, it can still obtain a bargaining order if it files election objections, has the election set aside, and meets the standards necessary for a bargaining order. *Irving Air Chute Co., Inc.*, 149 N.L.R.B. 627 (1964), *enf'd*, 350 F.2d 176 (2d Cir. 1965). Generally, the Board will only issue a *Gissel* bargaining order where the employer has committed numerous unfair labor practices that render traditional remedies inadequate to ensure a fair representation election and where the union can show it has secured authorization cards from a majority of the bargaining unit employees. *See, e.g., United Scrap Metal, Inc.,* 344 N.L.R.B. No. 55 (2005) (rejecting employer's claim that the General Counsel failed to show that the union achieved majority status, relying in part on the employer's position statement filed with the Board).

5. After Acquired Contract Clause. If the union contract contains an "after acquired" clause, requiring recognition of the union at future employer locations upon proof of majority status, an employer may be deemed to have waived the right to demand an election. *See Central Parking System, Inc.*, 335 N.L.R.B. No. 34 (2001). *But see Shaw's Supermarkets,* 343 N.L.R.B. No. 105 (2004) (granting review and hearing regarding whether the employer clearly and unmistakably waived the right to a Board election by an after acquired clause and, if so, whether public policy reasons outweigh the employer's private agreement not to have an election).

C. Employer's Response To Union Strategy. It is critically important for an employer to establish lines of communications with employees so that its first knowledge of a union drive does not come by way of a union demand for recognition or an NLRB petition received in the mail. The earlier an employer finds out about union activity, the more likely it is that it can be stopped. Activity that predates a union's filing of a petition with the NLRB seeking an election cannot be used by the union as an election objection, *i.e.*, only post-petition conduct is objectionable (absent very unusual circumstances). If the employer undertakes an active anticard signing campaign, it may be able to keep the union from securing sufficient authorization cards or employee support to gain a bargaining order.

To remain union free, an employer's operations need to be as issue-free as possible before union activity starts.

D. Employer Anticard Signing Campaign.

1. Intelligence First. In the majority of cases, some precipitating event precedes union representation. In all likelihood, the union will have made representations to those employees as to how it will deal with that event or how it would prevent similar occurrences in the

future. It is much better to build the prepetition campaign around this narrow and real issue than to use a scattergun approach.

The employer should attempt to ascertain whether the union's support is general throughout the employee group or localized, and the approximate overall extent of it. In other words, take some "head counts" by polling supervisors.

The employer should also interview supervisory staff for information regarding recent unusual events or conditions. The employer should ensure that supervisors are prepared to fully and properly respond to questions that employees typically ask during the organizing drive. See the Appendix to this Chapter, available at Ford & Harrison LLP's web site, www.fordharrison.com/sourcebooks.aspx, for a list of such questions and suggested answers.

The employer should ensure that supervisors know all the legal "dos and don'ts" and should instruct them using the "TIPS" acronym ("threats, interrogation, promises, surveillance"). If an employer learns of union activity before a petition has been filed, this may mean that the union still has less than the thirty percent showing necessary to support a petition or less than a card majority. Swift counteraction may prevent or discourage the filing of a petition. Employers can post notices and give an anticard signing speech, but should consult with a labor lawyer before making such a speech.

2. Anticard Signing Speeches. An anticard signing speech should inform the employees that the employer is firmly opposed to having this union or any union. It should also inform the employees that it is not necessary for anyone to belong to or join any labor union in order to get or keep a job at the company and should inform employees that those who join or support a union will not receive any advantage or preferential treatment over those who do not. The speech should also point out negatives of signing a union authorization card such as that the employee agrees to pay dues, initiation fees, and assessments as determined by union without knowing whether the union can or will produce a satisfactory contract. Additionally cards may be used to demand recognition without an election. The card is essentially a "blank check" to the union, in which the signer subjects her or himself to union rules and regulations that she or he may later find oppressive and unwelcome.

An employer may also educate employees on the negatives associated with unions during the employer's anticard signing campaign. Such negatives include, among others, such matters as dues, fines, union assessments, union rules in a union's constitution, loss of individual freedoms, how employees can lose wages and benefits during union negotiations, and strikes. However, employers must carefully consider using these communications during the anticard signing campaign as their use at that time detracts from their effectiveness when the "war" is on the line during the campaign period preceding the vote.

With proper safeguards, it is lawful to guide employees who may wish to revoke union authorization cards before or after hearing the employer's presentations. This, however, should be accomplished in close cooperation with labor counsel.

The employer generally should decline invitations to debate with union organizers with the explanation that the employer is not out to help the union by providing it with an audience.

IV. NLRB REPRESENTATION PROCEDURE

A. Basis for Asserting Jurisdiction Under the NLRA. There are two key standards for asserting jurisdiction under the NLRA. One is the retail standard. Under this standard, the employer must do some business across state lines and have gross annual volume of business of at least $500,000. Under the nonretail standard, the employer must have an annual outflow or inflow, directly or indirectly, across state lines of at least $50,000.

B. Stipulated Election vs. Hearing. A critical step in a labor union's attempt to unionize a group of employees is the determination of the voting unit. This is done in one of two ways. In a stipulated election agreement brokered by the Regional Office of the NLRB, the company and union agree to such things as which employees will be eligible to vote in the election and the time, date and place of the election. If the parties do not agree to a stipulated election, the Board will hold a hearing. In this hearing, the employer may litigate matters such as the supervisory status of individuals; the appropriateness of the petitioned-for unit, including expansion or contraction of the unit, unit placement issues, and multi-facility unit; managerial and confidential status of employees; eligibility of part-time employees; eligibility of certain classes of employees such as "plant clericals" and quality control employees; jurisdiction of the Board; whether the union is a labor organization; union conflict of interest; contract bar, and other issues. Strict rules of evidence do not apply.

1. Benefits of a Hearing. The benefits of a hearing include the possibility of getting the petition dismissed. Additionally, a hearing guarantees an employer that it will have issues to litigate before a court of appeals rather than bargain with the union if it loses the election. Since the eligibility date for voting in the election is the payroll period immediately preceding the Regional Director's decision and direction of election, the eligibility cutoff date for voting in the election is postponed until a decision is issued. This may make employees hired after the hearing eligible to vote. The employer may be able to wear the union down and possibly get it to withdraw its petition because of cost to the union of hiring an attorney and litigating at a hearing, as well as the knowledge that the employer may appeal an election loss to the courts. The employer may be able to successfully argue to the Regional Director that certain classifications should be included or excluded from the unit. Additionally, the employer may be able to obtain beneficial information on the union at a hearing.

2. Benefits of a Stipulated Election. The employer may be able to postpone the election date and/or may be able to get a postponed eligibility date, which will enable new hires to vote even though the traditional eligibility date is the payroll period immediately preceding the Regional Director's approval of the stipulation. Additionally, the employer can get the date it wants for an election, which enables the employer to know the date, while in directed elections following a hearing, the election date is twenty-five to thirty days after decision and direction of election, absent highly unusual circumstances. A stipulated election avoids the cost of a hearing, the brief to the Regional Director, and appeal to the Labor Board in Washington. Additionally, the union may be willing to include or exclude certain disputed classifications to avoid a hearing that otherwise might be determined adversely to employer's interest. The Board must rule on election objections filed by the employer if a stipulated election is agreed to. A stipulated election avoids the union politicizing the hearing.

3. *Excelsior* Lists. In *Excelsior Underwear, Inc*., 156 N.L.R.B. 1236 (1966), the Board required employers to submit a list of all eligible voters' names and addresses to the Regional Director who is conducting the election so that the list could be supplied to all parties. In *NLRB v. Wyman-Gordon Co*., 394 U.S. 759 (1969), the U.S. Supreme Court upheld the NLRB's right to enter such an order. The Board has clarified the *Excelsior* requirements, holding that the employer must provide full names. *See North Macon Health Care Facility*, 315 N.L.R.B. No. 50 (1994). The Board has further clarified this rule by stating that it will consider not only the percentage of omissions relative to the number of employees, but also other factors such as whether the number of omissions is determinative (i.e., whether it equals or exceeds the number of additional votes needed by the union to prevail in the election), and the employer's explanation for the omissions. *Woodman's Food Markets, Inc*., 332 N.L.R.B. No. 48 (2000). Parties may agree to a *Norris Thermador* list wherein agreement is reached as to the eligibility of voters by name, reducing the likelihood of challenges as to eligibility at election.

4. Request for Review. If a hearing is held after the Regional Director issues a decision in which she or he either dismisses the petition or directs election, the parties are given an opportunity to file a request for review with the NLRB seeking to overturn the Regional Director's adverse holdings. The parties must file a request for review with Board in Washington within fourteen days after service of decision by the Regional Director (no extra days are added for mailing). Filing of a request for review does not operate as a stay of election. If the request for review is granted, the election may be canceled, but most likely it will be held and ballots will be impounded. The Region attempts to conduct the election within forty-five days from date petition is filed. The election is conducted by an NLRB agent and all parties are entitled to an equal number of election observers who must be nonsupervisory employees of employer.

Election Observers. Although the NLRB previously allowed unions to use low-level supervisors as election observers, the Board reversed its position in *Family Services Agency, San Francisco*, 331 N.L.R.B. No. 103 (2000). In *Family Services*, the Board held that "to avoid the possibility that voters may perceive the participation of a statutory supervisor in the actual balloting process, even in the limited role of an observer, as calling into question the integrity of the election process, we have decided to eliminate this exception and announce a rule prohibiting the use of supervisors as observers."

Observers may challenge voters at the election, but only before the challenged voter's ballot is placed in the ballot box. If challenged ballots are determinative of the election results, the Region will investigate and determine whether challenged voters are eligible to vote.

5. Election Objections. After the election, the parties have seven calendar days after the tally of the ballots to file election objections concerning conduct that occurred after the union filed its petition. NLRB Rules and Regulations 102.69(c)(2). Only under very limited circumstances may prepetition conduct be a basis for setting aside results of election. In *Ensign Sonoma, LLC d/b/a Sonoma Health Care Center and Health Care Workers Union,* 342 N.L.R.B. No. 93 (2004), a majority of the Board held that an election must be set aside when the conduct of the Board election agent tends to destroy confidence in the Board's election process or could reasonably be interpreted as impairing election standards. Under this standard, a majority of the Board concluded that statements of personal opinion by a Board agent may be sufficiently partisan to warrant setting aside the election even if the comments were made to a limited audience and were not accompanied by procedural irregularities or other actions that "reasonably create the appearance that the election procedures will not be fairly administered."

The NLRB will attempt to investigate election objections/challenges within thirty days and the Regional Director will attempt to issue a report on challenged ballots and/or objections within thirty-five days. The report can: (1) overrule any or all objections and/or challenges; (2) sustain any or all challenges and/or objections and recommend or direct a new election on the basis of objectionable conduct; or (3) send any or all objections and/or challenges to a hearing. Regardless of whether a post-election hearing is held pursuant to a stipulated election, the parties can appeal to the NLRB in Washington, which reviews the Regional Director's report upon a timely filing of exceptions or a request for review.

If the union prevails and is certified, the employer must decide whether to bargain or litigate various issues before the NLRB and/or courts by way of a refusal to bargain charge. (Section 8(a)(5)). Historically, the Board decides such a charge summarily against the employer, and the merits of the representational issues are reviewed only by a federal court of appeals. In *Sub-Zero Freezer Co*., 271 N.L.R.B. 47 (1984), the Board departed from its normal practice and revoked the union's certification when the employer refused to bargain, based on the

employer's objections to pre-election conduct by the union, which the Board had previously considered in the representation case.

There is no direct review by courts of NLRB representation matters (absent highly unusual circumstances); employers must refuse to bargain with the certified union in order to get review by the courts of an NLRB decision to certify a union.

C. Appropriate Bargaining Unit. The definition of an "appropriate" bargaining unit is a consideration in any representation proceeding. The NLRB will define a bargaining unit and in doing so looks not to the "most" appropriate unit but to "an" appropriate unit. A proposed unit is generally considered appropriate if the employees in the proposed unit share a "community of interest." In determining the appropriateness of multi-site bargaining units, a finding of a "community of interest" is based upon an assessment of the following five factors: (1) centralized control of labor relations and supervision; (2) similarity of wages and benefits; (3) degree of multi-site employee transfer; (4) similarity of skills, functions, and working conditions; and (5) the parties' bargaining history. *See Cleveland Constr. v. NLRB*, 44 F.3d 1010 (D.C. Cir. 1995). *See also Jerry's Chevrolet, Inc.,* 344 NLRB No. 87 (2005) (Board majority ruled that the employer overcame the strong presumption in favor of a single-facility bargaining unit and held that a unit of technicians at all four of the employer's dealerships was the appropriate unit for bargaining, based primarily on two factors: (1) the facilities in question were located next to each other; and (2) the technicians' immediate supervisors at each location had extremely limited authority over the employees; key employment-related decisions were made centrally by top management); *but see Catholic Healthcare West,* 344 N.L.R.B. No. 93 (2005) (In finding that the employer had not rebutted the single-facility presumption, the Board majority focused on the geographical separation (12-20 miles), the fact that temporary transfers between facilities "are the exception rather than the norm," and the local autonomy exercised by supervisors at each facility on "such matters as assignment of work, discipline of employees, preparation of performance appraisals, scheduling, grievance handling, and hiring.")

1. Supervisors Under the NLRA. The Act defines "supervisor" as any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. 29 U.S.C. § 152(11).

This definition has three components. *See NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571 (1994). First, the employee must hold the authority to engage in any one of the twelve listed supervisory functions; second, the employee's "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment"; and third, the employee's authority is held "in the interest of the employer." *Id.* at 573-74. Note, on August 24, 1999 the NLRB issued a forty-eight page guidance memo on the supervisory status of nurses, summarizing legal issues and including a checklist format.

In *NLRB v. Kentucky River Community Care, Inc*., 532 U.S. 706, 714 (2001), the U.S. Supreme Court held that the Board could not find a lack of independent judgment merely because the judgment was based on "professional or technical judgment in directing less-skilled employees to deliver services." The Court held that "[t]he first five words of this interpretation insert a startling categorical exclusion into statutory text that does not suggest its existence." *Id.* Accordingly, the Court held that the Board erred when it determined that nurses were not "supervisors" within the meaning of the NLRA.

The "Kentucky River Trilogy". Following the Supreme Court's decisions in *Kentucky River,* the Board issued a trilogy of decisions providing long-awaited guidance for determining

supervisory status under the NLRA. *See Oakwood Healthcare, Inc*., 348 N.L.R.B. No. 37 (2006); *Golden Crest Health Care Center*, 348 N.L.R.B. No. 39 (2006); *Croft Metals Inc*., 348 N.L.R.B. No. 38 (2006). In *Oakwood Healthcare*, the Board defined the terms "independent judgment," "assign," and "responsibly direct" as those terms are used in the NLRA's definition of supervisor. The Board revised its definition of the term "independent judgment" in light of the Supreme Court's decision in *Kentucky River* that the Board had defined that term too narrowly.

Consistent with the *Kentucky River* decision, the Board held that the term "independent judgment" applies regardless of whether the judgment is exercised using professional or technical expertise. "In short, professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11)." *Oakwood Healthcare,* 348 N.L.R.B. No. 39. The Board held that judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement.

The Board defined "assign" as the "act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, *i.e*., tasks, to an employee." *Id.* Assign refers to the designation of significant overall duties, not the discrete instruction to perform a specific task. In the healthcare setting, the Board held that "assign" encompasses the charge nurses' responsibility to assign nurses and aides to particular patients. *Id.*

In defining "responsibly direct" the Board held that the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, "such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." *Id.* Thus, to establish accountability for the purposes of responsible direction, the Board held that the employer must show that it delegated to this person the authority to direct the work and take corrective action if needed. Additionally, it must be shown that there is a possibility of adverse consequences to the supervisor if he or she does not properly direct the work or take the necessary corrective action. The Board also noted that in directing others, this person is carrying out the interests of management. Excluding from the coverage of the Act individuals who are aligned with management is the heart of § 2(11). *Id.*

In *Oakwood Healthcare*, the Board held that permanent charge nurses employed by Oakwood Heritage Hospital exercised supervisory authority within the meaning of § 2(11) and, thus, should be excluded from the bargaining unit of RNs. The Board found that the permanent charge nurses met the definition of "assign" when they assigned nurses to specific patients for whom they would care during their shift. The permanent charge nurses also exercised independent judgment in making such assignments. However, rotating charge nurses did not exercise supervisory authority for a substantial part of their work time, thus they were not considered supervisors.

In *Golden Crest Health Care Center*, 348 N.L.R.B. No. 39 (2006), a three-member panel of the Board applied the terms "assign," "responsibly direct," and "independent judgment" as defined in *Oakwood Healthcare* and held that charge nurses employed by Golden Crest Health Care Center were not supervisors under § 2(11) of the Act.

In *Golden Crest*, which involved the status of charge nurses at a nursing home, the Board determined that the charge nurses did not have actual authority to assign employees; the assistant director of nursing (an undisputed supervisor) performed this duty. While there was evidence that charge nurses could request employees stay beyond the end of their shift, there

was no evidence they could require an employee to do so. In some situations, the charge nurse could issue a "mandate" that an employee report to work, but only if the admitted supervisors authorized this. The penalty for refusing such a mandate was de minimis, which is another factor the Board considered in finding that the charge nurses did not exercise supervisory authority in assigning employees.

The Board also held that while the charge nurses had the authority to direct nursing assistants, they were not accountable for the job performance of the employees they directed. Thus, the charge nurses employed by Golden Crest were not supervisors under § 2(11). *Id.*

In *Croft Metals*, 348 N.L.R.B. No. 38 (2006), also a decision by a three-member panel, the Board held that the lead persons in a manufacturing facility were not supervisors under the standards articulated in Oakwood Healthcare. In this case, the Board determined that the lead persons did not have the authority to "assign" under the Act; however, the Board did find that they responsibly directed their line crew or members. This was not sufficient to establish supervisory status, however, because the Board found that the lead persons did not exercise independent judgment. This decision highlights the fact that even if the worker performs one of the twelve duties in the NLRA's definition of supervisor, he or she must also exercise independent judgment to be considered a supervisor under the Act.

Faculty Members of Academic Institutions. In a case handled by Ford & Harrison attorneys, the D.C. Circuit Court of Appeals held that Board failed to adequately explain its determination that faculty members of an academic institution are covered by the NLRA. *See Point Park University v. NLRB,* 457 F.3d 42 (D.C. Cir. 2006). Accordingly, the court remanded the case to the Board so that it can either explain its decision as required by applicable law or reconsider its determination.

In the trial of this case, which was handled by another law firm, the NLRB Regional Director determined that faculty members of Point Park University are professional employees, entitled to unionization under the NLRA, rather than managerial employees, who would not be entitled to unionize under the Act. The Board affirmed the Regional Director's Decision and Direction of Election and denied the University's Petition for Review. The D.C. Circuit remanded, holding that the Board failed to adequately explain why the faculty's role at the University is not managerial and failed to follow the requirements under applicable U.S. Supreme Court and D.C. Circuit law.

The U.S. Supreme Court first held that faculty members at colleges and universities may be managerial employees exempt from the NLRA's coverage in *NLRB v. Yeshiva University,* 444 U.S. 672 (1980). In *Yeshiva*, the Court held that the Board must consider the faculty's authority in academic and non-academic matters such as: curriculum, course schedules, teaching methods, grading policies, matriculation standards, admission standards, size of the student body, tuition to be charged, and location of the school. Subsequently, in *LeMoyne Owen College v. NLRB*, 357 F.3d 55 (D.C. Cir. 2004), the D.C. Circuit held that the Board must, when applying the *Yeshiva* test to varied factual situations, explain "which factors are significant and which less so, and why . . . ." In *Point Park*, the D.C. Circuit noted that this determination requires an "exacting analysis" of the faculty member's duties in the context of the academic institution in question.

Here, the Board adopted the Regional Director's decision with limited discussion. The Regional Director's decision was 108 pages long with 59 pages of factual findings and 16 pages of legal analysis that identified and relied upon a host of factors, but failed to identify which of the *Yeshiva* factors were significant and which were not. The D.C. Circuit noted that some of the findings "suggest that the faculty are managerial employees, while others suggest they are not." *Point Park,* 457 F.3d at 50.

The court held that the Board's determination was not entitled to deference because the Board failed to adequately explain its reasoning, noting that the court cannot "fill in critical gaps in the Board's reasoning." *Id.* Accordingly, D.C. Circuit remanded the case for further proceedings consistent with the decision.

2. Temporary and Nontemporary Employees. The Board has returned to its long-standing precedent that combined units of solely and jointly employed employees are multiemployer bargaining units and are statutorily permissible only with the consent of the parties. *See H.S. Care LLC, d/b/a/ Oakwood Care Center,* 343 N.L.R.B. No. 76 (November 19, 2004). This decision overrules the Board's 2000 decision in *M.B. Sturgis,* 331 N.L.R.B. 1298 (2000), which held that bargaining units of solely and jointly employed employees are permissible under the NLRA. In overruling the prior decision, the Board held "the *Sturgis* Board's reinterpretation of the concept of an 'employer unit' severed that term from its statutory moorings." The Board further noted this "loss of direction" gave rise to such "anomalous decisions" as *Gourmet Award Foods,* 336 NLRB No. 77 (2001), which applied a collective bargaining agreement between an employer and its employees to employees supplied by a temporary agency.

In *Oakwood Care Center,* the Board returned to the precedent set in *Greenhoot, Inc.,*205 NLRB No. 37 (1973), and *Lee Hospital,* 300 NLRB No. 131 (1990), and held that the NLRA does not authorize the Board to direct elections in units encompassing the employees of more than one employer. The Board also noted that where the parties voluntarily agree to multiple employer bargaining units, the Board has long recognized the legitimacy of such units. According to *Oakwood Care Center,* by ignoring the bright line between employers and multiemployer bargaining units, *Sturgis* departed from the directives of the NLRA and decades of Board precedence. The Board further stated, "[w]e find that the new approach adopted in *Sturgis*, however well intentioned, was misguided both as a matter of statutory interpretation and sound national labor policy."

3. Acute Care Hospitals. The Board has published rules defining eight appropriate bargaining units in acute care hospitals. The U.S. Supreme Court held these rules to be valid in 1991. *See American Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991). The rules apply to units of six or more employees (smaller units are decided on a case-by-case basis). The rules only apply to acute care hospitals. The eight presumptively appropriate collective bargaining units are: (1) physicians; (2) registered nurses; (3) other professional employees (*i.e.*, pharmacists and occupational therapists); (4) medical technicians and LPN's; (5) skilled maintenance workers; (6) clerical workers; (7) guards; (8) other nonprofessional employees (*i.e.*, housekeeping, food service). For nonacute care health care facilities, the Board applies a "pragmatic" or "empirical" community-of-interest test in determining unit appropriateness. *See, e.g., Virtua Health, Inc.,* 344 N.L.R.B. No. 76 (2005) (applying standard set forth in *Park Manor Care Center,* 305 N.L.R.B. 872 (1991), in which the Board considered traditional community-of-interest factors, as well as the factors considered relevant by the Board in the Rulemaking, and prior cases involving either the type of facility in dispute or the type of unit sought; finding that a state wide unit limited to paramedics, excluding other technical employees, was inappropriate).

V. ELECTION CAMPAIGN – LEGAL CONSIDERATIONS

NLRB elections are conducted in accordance with strict standards designed to give the employee-voters an opportunity to freely indicate whether they wish to be represented for purposes of collective bargaining. These standards are violated if the employer disturbs the "laboratory conditions" under which NLRB elections are held.

Chapter Twenty-Five

A. Typical Objections Filed By Employer.

1. Improper waiver of initiation fees by a union. The union cannot condition waiver of initiation fees upon joining a union or signing a union card prior to the election. A union does not, however, commit a ULP by offering a fee waiver if it wins the election, because the waiver is available to all and does not depend upon the employee's individual vote.

2. An atmosphere of violence or threats of violence may be a sufficient basis to set aside an election even if a third party engaged in the conduct.

3. Interjection of race into the campaign. The union (or employer) cannot engage in inflammatory appeals to racial prejudice. *See M&M Supermarkets v. NLRB*, 818 F.2d 1567 (11th Cir. 1987) (setting aside a union election victory where an employee referred to the employer's owners as "damn Jews"); *Ki (USA) Corp. v. NLRB*, 35 F.3d 256 (6th Cir. 1994) (overturning NLRB bargaining order after an election, holding that the election was "tainted" due to the distribution of an "anti-American letter" containing negative stereotyping of Japanese (the owners of the company) by the union); *but see Beatrice Grocery Products*, 287 N.L.R.B. No. 31 (1987), *enf'd*, 872 F.2d 1026 (6th Cir. 1989) (The Board refused to set aside a union victory based on a union leader's claim that the plant manager had called employees "dumb niggers.")

An employer may not sue a union for defamation stemming from the union's picketing signs and handbills declaring the employer to be a "racist" or "unfair to African-American employees." *Beverly Hills Foodland, Inc. v. United Food and Commercial Workers Local 655*, 39 F.3d 191 (8th Cir. 1994). In *Beverly*, the court explained that to prevail with a libel or slander claim in the context of a labor dispute, the employer would have to show by clear and convincing evidence that the defamatory publication was made with knowledge that it was false or with reckless disregard of whether it was false or not. In addition, the court noted that terms such as "unfair," "fascist," and "racist" are subjective in nature, cannot be proven false, and cannot form the basis of liability under state (Missouri) libel law.

4. The conferring of pre-election benefits that are sufficiently valuable and desirable in the eyes of the employees to whom they are offered has a potential influence on the person's vote. *See Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578 (6th Cir. 1995) (union's filing of a lawsuit against the employer the day before the election and its statements that employees were due approximately $35,000 materially affected the election results in favor of the union, rendering the election invalid); *Comcast Cablevision-Taylor v. NLRB*, 232 F.3d 490 (6th Cir. 2000) (union's offer of a free trip to Chicago so employees of Comcast Cablevision-Taylor could attend a union meeting on cable industry issues unduly influenced the outcome of a representation election; the court refused to enforce a Board order certifying the union as the bargaining agent for Comcast's employees); *but see Detroit Auto Auction v. NLRB*, 120 S. Ct. 787 (2000) (lower court case reported at 1999 U.S. App. LEXIS 13987) (The U.S. Supreme Court let stand a union's pre-election promise to provide each employee $150 per week in the event of a strike. The lower court held that this was not impermissible vote buying.)

B. Typical Objections Filed By a Union. Conduct that constitutes a ULP would generally be sufficient to set aside the results of an election. *Dal-Tex Optical Co., Inc.*, 137 N.L.R.B. 1782 (1962). Promising or granting benefits prior to election would generally be a ULP and grounds for setting aside an election. Other conduct that improperly upsets the laboratory conditions necessary for a fair election will also be sufficient to set aside the results of an election. Handling or collecting a voter's mail ballot in a representation election is objectionable and may be grounds for setting aside the election. *See Fessler & Bowman Inc.,* 341 N.L.R.B. No. 122 (2004).

The test is whether the conduct is sufficient to upset the laboratory conditions necessary for a free and fair election, not whether the conduct violates the ULP aspects of the Act. Examples:

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1. Soliciting grievances from employees, either individually or in meetings.

2. Management or agents of management visiting employees at their homes to urge them to reject the union.

3. Campaigning in the immediate vicinity of the polls while the polls are open.

4. Maintenance of unlawful, overly broad no solicitation or no distribution rules during a union campaign. Note, the Labor Board ruled that requests to show union promotional videos in nonwork areas during nonwork time (on battery operated TV/VCR's) is the equivalent of the distribution of union literature in nonwork areas during nonwork time and may not be banned without showing it is necessary to maintain plant discipline or production. Report of the General Counsel, 1994 BNA DLR 226:D-1. In *Santa Fe Hotel, Inc.*, 331 N.L.R.B. No. 88 (2000), the Board held that the entrances outside a hotel-casino were not working areas for the enforcement of a no distribution rule because only work that was incidental to the hotel's main function of providing lodging and gambling was performed there. Accordingly, the hotel could not enforce its no distribution rule to prevent hand billing at the entrances by off-duty employees.

5. Supervisors present in voting area while balloting is occurring.

6. Denying employees access to plant premises where polls are located.

7. Passing out antiunion buttons under certain circumstances.

8. Holding a massed meeting on paid company time within twenty-four hours of the election to campaign against the union. *See Peerless Plywood Co.*, 107 N.L.R.B. 427 (1953); *but see Chicagoland Television News, Inc.*, 328 NLRB No. 48 (1999) (twelve-hour long pre-election party the day before the election was not enough to set aside the election where employer had a history of hosting such events, electioneering was not permitted, and no speeches were given).

9. Refusing to submit an *Excelsior* list of eligible voters including the employees' full name to the Labor Board for use by the union. *Macon Health Care Facility*, 315 N.L.R.B. No. 50 (1994).

10. Unequal enforcement of rules or policies.

11. Discriminatory discipline to union supporters.

12. Enforcing rules and policies more strictly than before the union arrived on the scene.

13. Prohibiting distribution of union leaflets in check-in, mixed use areas.

14. Alteration of paycheck process less than twenty-four hours before a union vote.

15. Offering off-duty employees two hours of pay if they would come in to vote linked to an antiunion message.

Under the *Milchem* Rule (*Milchem Inc.*, 170 N.L.R.B. 362 (1968)), the Board prohibits parties from having sustained conversations with voters waiting to cast their ballots, regardless of the content of the remarks. The Board also prohibits election observers from maintaining a list of eligible voters. *Milwaukee Cheese Co.*, 112 N.L.R.B. 1383 (1955). The Board does, however, permit election observers to keep lists of persons they intend to challenge, as long as voters do not generally observe the lists.

C. Right of Free Speech and Labor Board Imposed Limitations. Section 8(c) of Act gives employers the right to engage in free speech; however, the U.S. Supreme Court and the Labor Board have restricted employers' freedom of speech.

The U.S. Supreme Court stated in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969):

> [a]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. *See Textile Workers v. Darlington Mfg. Co*., 380 U.S. 263, 274 n.20 (1965). If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.

The Labor Board has in some cases given employers a greater ability to make § 8(c) statements regarding unionization. *See Tri-Cast, Inc*., 274 N.L.R.B. No. 59 (1985). Examples:

1. Has allowed employers to tell employees bargaining starts from scratch, if explained in context.

2. Has allowed employers to tell employees how get their union cards back even when employees have not requested this information. This can be very effective if instituted during a card signing campaign, because unions seldom explain the real reasons they want the employees to sign the cards and what the cards mean. However, the employer may not "assist" employees in asking for cards back.

3. Has allowed employers to inform employees that no union can get them more than they can get for themselves.

4. Under certain circumstances, has allowed employers to inform employees that wage increases could be delayed as a result of negotiations with the union.

5. Has allowed employers to inform employees that many employees have told the company of their support for the company and that the company appreciated their loyalty and it looked like the union would lose the election.

6. Has allowed an employer to inform employees that the company can negotiate an agreement with the union that does not cost the company any more in wages and benefits than without the union presence and may even cost less but that experience has shown the company that the presence of a union results in a tense working relationship with extreme disharmony among employees that can result in loss of customers and loss of income to employees.

7. Misrepresentations about the union will no longer be a basis for setting aside the results of an election. Misrepresentations about the Board's processes have been such a basis. *Riveredge Hospital*, 264 N.L.R.B. 1094 (1982). The Board has allowed an employer, in certain limited circumstances, to tell its employees that its customers have expressed disfavor with the possibility of the employer becoming unionized, and that this may cost the employer the customer's business.

8. Has permitted the employer to circulate a memorandum to employees giving a specific, concrete example of a negative outcome for employees who were represented by the same union seeking to represent the employer's employees, where the memorandum did not predict the same thing would happen to these employees but instead noted that "each set of

> negotiations is different." *See Manhattan Crowne Plaza Town Park Hotel Corp.,* 341 N.L.R.B. No. 90 (2004).

In *Leedom v. Kyne*, 358 U.S. 184 (1958), the Court held that Board decisions in representation matters are not directly reviewable by courts until the employer has gone through the refusal to bargain mechanisms. In very limited circumstances, in which the Board has acted in excess of delegated powers and contrary to a specific prohibition in the Act, court review may be appropriate.

VI. CAMPAIGN STRATEGY

A. Union Campaign Strategy. During a campaign, unions may hold frequent meetings with employees to keep their spirits up. Unions will engage in as many home visits as they can. Unions may file ULP charges to try to get an employer to limit its campaign, for their own campaign purposes, and to cost the employer money. Unions may give away free drinks, free hats, free buttons, etc. Unions may hand out campaign propaganda attacking the employer. Smart unions will generally shy away from making unrealistic promises because they are too easy for the employer to rebut. Unions, particularly in right-to-work states, may tell employees that they will not ever have to join the union and will not even be asked to join until after the union has won the election and negotiated a contract, and, therefore, they have nothing to lose by voting for the union, a campaign technique that is particularly effective and must be anticipated.

In *NLRB v. Savair Manufacturing Corp*., 414 U.S. 270 (1973), the U.S. Supreme Court held that it was objectionable conduct for a union to offer to waive initiation fees for employees who signed union cards prior to an election.

B. Employer Campaign Strategy.

1. Education and Use of Supervisors. Instruct supervisors about the law, making sure they are prepared to respond fully and properly to employee questions. See the Appendix to this Chapter, available at Ford & Harrison's web site, http://www.fordharrison.com/sourcebooks.aspx, for a list of typical questions asked by employees during an organizing drive, along with suggested answers to the questions. Make them a part of the management campaign team. Describe their individual stake in outcome. Supervisors must understand that a union would attempt to limit supervisory decision-making and generally make life more difficult for the supervisor.

2. Business Decisions During Campaign. Adopt an attitude that it will be business as usual during campaign with the following exceptions:

a. Instruct supervisors not to discharge any employee without top management approval.

b. Do not, if possible, take actions that create uncertainty in the workforce.

c. Do not, when possible, implement plans that would predictably be met with disfavor by the employees.

d. Do enforce all rules fairly and consistently.

e. Do not "tighten up" on rules.

Hold an Initial Strategy Session between top management and counsel. Select which member or members of management will serve as the employer's principal communicators.

3. Theme To Be Used During Campaign.

a. Positive. Emphasize the employer's good features and positive aspects of the present work environment. If the employer has a poor history, point to recent changes, such as

new supervisors or recent addition to economic benefits package. Emphasize recent changes in top management and disassociate the current leadership from the past, if appropriate.

b. Negative. Present the problems employees may face if the union wins. Emphasize the track record of the particular union involved based on sources such as financial statements, organizer salaries, constitution and bylaws, and strike history. Point out the union's record at other local employers, especially if the other employers have a contract providing less favorable terms than exist at company they are trying to organize. Point out other negatives, such as a company with a union contract that ceased doing business or a strike in the local area. Make employees aware of any record of the union in connection with any criminal conduct or pension fund problems. Make sure employees understand the collective bargaining process and how employees could end up with less. Point out the potential financial costs, loss of freedom, and strike issues.

Recognize that one of the primary campaign issues is credibility. Be on the lookout for ways to point out the union's lack of credibility, being careful not to place the employer's own credibility in question.

4. Speeches. Section 8(c) of the Act gives the employer the right to freedom of speech as long as the expression contains no threat of reprisal or force or promise of benefit. Speeches should be in writing so employer can prove what was said. Speeches should discuss union constitution, bylaws, LM reports, union "dirty laundry," collective bargaining and strikes, and company benefits. Some campaigns call for one to two speeches; others require more frequent group speeches and meetings. The employer should be aware that it cannot make speeches within twenty-four hours of election. Attorneys should review and revise speeches and give legal advice.

5. One-On-One Contact. This is a good way to get the employer's message across but presents dangerous credibility problems. For example, the employee being addressed may misunderstand or not tell the truth or the supervisor may say something inappropriate during the discussion.

6. Polling. Poll the supervisors weekly to find out how employees stand. Take employee headcounts using criteria – for the union, against the union, neutral or don't know. Note that polling **employees** (as compared to supervisors) may violate the NLRA and should not be done without consulting experienced employment counsel.

7. Handouts. Use handouts, pay envelope enclosures, personalized letters to the homes, existing employee newsletters, bulletin board postings, and posters. Mailouts are effective as they get the spouse involved. Posters may also be used during campaign.

8. Gimmicks.

a. Raffles: In *Atlantic Limousine Inc*., 331 N.L.R.B. No. 134 (2000), the Board adopted a bright line rule prohibiting election-day raffles if: (i) eligibility to participate in the raffle is tied to either voting in the election or being at the election site on election day; or (ii) the raffle is conduced during a period from twenty-four hours before the opening of the polls until the closing of the polls.

b. Quizzes and contests may be used. But note that a "union truth quiz" conducted by an employer during an election campaign violated § 8(a)(1) in *Sea Breeze Health Care Center, Inc*., 331 N.L.R.B. No. 149 (2000). The quiz required employees to identify themselves and asked about their feelings about union.

c. Deduction of dues from paycheck, but must be done before the last week of the election.

d. Money in tank/large check.

e. Movies and videotapes of past television programs.

f. Some gimmicks may violate the Act. *See Fermont Division Dynamics Corp. of America*, 286 N.L.R.B. No. 96 (1987), in which the award of prizes for employees writing a pro-company or antiunion slogan was found to be a grant of benefit and thus violative of § 7 of the Act.

While the Board maintains its position that merely making antiunion T-shirts available is lawful, the Fourth U.S. Circuit Court of Appeals has affirmed a Board decision holding that when an employer required employees to "sign" for the T-shirts during a union organizing drive and refused to give the T-shirts to openly pro-union workers, the employer committed an unfair labor practice. *House of Raeford Farms v. NLRB*, 7 F.3d 223 (4th Cir. 1993). The employer may not set up a "Vote No" committee among employees. If employees choose to do so on their own, however, this can be very effective.

VII. UNFAIR LABOR PRACTICES - EMPLOYER

A. Interference with § 7 Rights (§ 8(a)(1)). Section 8(a)(1) of the NLRA prohibits interference, restraint, or coercion of employees from exercising rights guaranteed in § 7 of the NLRA. Violations can be independent or derivative, *i.e*., violation of §§ 8(a)(2)-(5) also constitutes automatic violation of § 8(a)(1).

The U.S. Supreme Court has held that filing a reasonably based but unsuccessful lawsuit is not unlawful retaliation under § 8(a)(1). *See BE&K Construction Co. v. NLRB,* 122 S. Ct. 2390 (2002). This decision protects an employer's right to file a reasonably based lawsuit against a union based on the union's organizational activity, even if the employer's suit ultimately is unsuccessful.

Examples of Independent Violations.

1. Threats. An employer cannot threaten reprisals because employees engaged in union or protected activities. However, § 8(c) of Act gives the employer the right to free speech as long as the employer expression of free speech contains no threat of reprisal or force or promise of benefit. The U.S. Supreme Court has stated that an employer may, under limited circumstances, make a prediction, but "it must be carefully phrased on the basis of objective fact." *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).

In *Crown Cork & Seal Co. v. NLRB*, 36 F.3d 1130 (D.C. Cir. 1994), the court overturned a Board decision holding that a company's discussion of the possibility of closing the plant, laying off employees, and eliminating a retirement thrift plan if workers voted in favor of the union were illegal threats. The court noted that the employer's remarks were justified and in response to union flyers that were in anticipation of employer threats to close the plant and layoff workers. Furthermore, the letter spoke of "substantial risks" rather than "assertions of certainties," and to the extent they were predictions they were supported by objective facts. Interestingly, the court noted "if unions are free to use the rhetoric of Mark Antony while employers are limited to that of a Federal Reserve Board chairman, again, the employer's speech is not free in any practical sense." *See also Federated Logistics and Operations,* 400 F.3d 920 (D.C. Cir. 2005) (statements that bargaining would start from zero, that work would be moved to another facility in the event of a strike, that employees could lose their pensions and 401(k) plans following unionization and that the union "would strike," taken together amounted to a threat that the employer might take action on its own initiative to render unionization futile); *Gold Kist, Inc*., 341 N.L.R.B. No. 135 (2004) (employer violated § 8(a)(1) by showing a video and slide show on strike related violence during the course of a

union organizing drive); *Noah's Bay Area Bagels, LLC*, 331 N.L.R.B. No. 17 (2000) (comments by a company's CEO that if the union was certified, the negotiations would "start from zero" and they would "start from the ground up" (while touching the floor with his hand) violated § 8(a)(1)).

An employer may note the possibility that there may be wage reductions, if it is emphasized that any such reduction could only be undertaken through collective bargaining with the union. *Int'l Paper Co*., 273 N.L.R.B. 615 (1984). The Board has held, however, that a manager's statement that a profit-sharing program might not be available in the future to a group of workers if they voted for union representation was objectionable conduct warranting a second election. *See Cooper Tire & Rubber Co*., 340 N.L.R.B. No. 108 (2003). *See also Albany Medical Center,* N.L.R.B. No. 145 (2004) (supervisor's statements that a scheduled wage increase would not be implemented if the union were certified and that it would be subject to bargaining was ULP).

Even when there is a certified union, an employer may also advise employees of its opposition to their representation and its opposition to unionization generally. *Heck's, Inc*., 293 N.L.R.B. 1111 (1989).

Dissemination of Threats. The Board has changed position on whether threats will presumed to be disseminated. Overruling *Spring Indus. Inc*., 332 N.L.R.B. No. 10 (2000), the Board, in a 3-2 decision, held that an employer's threat to close its facility if employees voted for union representation will not be presumed disseminated throughout the bargaining unit. *Crown Bolt, Inc*., 343 N.L.R.B. No. 86 (2004). In *Spring Industries,* the Board held that that threats of plant closing are presumed to be disseminated among employees even though the only evidence of dissemination was that the employee who heard the threats "told everyone on break," which was one employee. In overruling *Spring Industries,* the Board held that *Kokomo Tube Co*., 280 N.L.R.B. 357 (1986) (which *Spring Industries* overruled) represents the better evidentiary rule in requiring the party who seeks to rely on dissemination throughout the plant to show it. Thus, the Board returned to the rule set forth in *Kokomo Tube*. However, the Board's decision in *Crown Bolt* only applies prospectively. Thus, the presumption of dissemination set forth in *Spring Industries* applies to cases pending when *Crown Bolt* was decided.

2. Interrogation. It is a violation for an employer representative or its agent to question employees about their union activity or the union activity of others, if such questions would tend to interfere with, restrain, or coerce the employee. *Rossmore House*, 269 N.L.R.B. 1176 (1984), *aff'd*, 760 F.2d 1006 (9th Cir. 1985). *See also United Services Auto. Ass'n v. N.L.R.B.,* 387 F.3dF.3d 908 (D.C. Cir. 2004) (affirming Board's determination that employer unlawfully interrogated employee regarding the distribution of fliers critical of recent employee layoffs; employer failed to show a legitimate business reason for the interrogation where it admitted it interrogated the employee to determine who prepared the fliers. The court also affirmed the Board's determination that the employee's dishonest answers during the unlawful interrogation did not constitute a lawful reason to discharge her.); *Michigan Road Maintenance Co. LLC,* 344 N.L.R.B. No. 77 (2005) (asking employee whether he had heard of the Teamster's efforts to organize employees and saying that the employer would shut its doors and sell the equipment if the employees tried to bring the Teamsters in was a ULP).

Questions dealing with union activity on employment application forms or in the hiring process may violate the Act. *Knickerbocker Plastic Co., Inc*., 96 N.L.R.B. 586 (1951). Interrogation of known union supporters about union sentiments, in the absence of threats or promises, is not *per se* unlawful, and all the circumstances must be considered. *Rossmore House*, 269 N.L.R.B. 1176 (1984), *aff'd*, 760 F.2d 1006 (9th Cir. 1985).

An isolated inquiry regarding what happened at a union meeting, devoid of coercive intent, was held lawful in *Herb Kohn Electric Co*., 272 N.L.R.B. 815 (1984), *enf'd, NLRB v. Herb Kohn Electric Co.,* 774 F.2d 1169 (8th Cir. 1985). An employer who distributed a letter during a union organizing campaign, asking employees to notify management of any "abusive treatment" by organizers, however, was held to be engaging in coercive behavior that violated the NLRA. *See Arcata Graphics/Fairfield, Inc*., 304 N.L.R.B. No. 68 (1991); *see also Bloomington-Normal Seating Co*., 339 N.L.R.B. No. 30 (2003) (holding that an employer's speech encouraging its employees to inform the company if the employees were threatened or harassed about signing a union card violated the NLRA because the only type of harassment for which the supervisor solicited reports was the protected activity of soliciting union authorization cards), *enforcement granted,* 357 F.3dF.3d 692 (7th Cir. 2004).

3. Promises of Benefits and/or Granting of Benefits. The U.S. Supreme Court analogized that promising benefits is like a "fist inside a velvet glove." An employer cannot grant or promise benefits with intent of dissuading employees from voting for the union. *NLRB v. Exchange Parts Co*., 375 U.S. 405 (1964). Employers are required to proceed as they would have done had union not been on scene. *Duo-Fast Corp*., 278 N.L.R.B. 52 (1986); *Gates Rubber Co., Inc*., 182 N.L.R.B. 95 (1970). This puts the employer in a "Catch-22" – it must act in the manner it would have acted had a union not been on scene, but if it does, an unlawful grant of benefits may be found. Under limited circumstances, an employer can postpone a grant of a wage increase or other benefits to avoid the appearance of vote buying. *Uarco, Inc*., 169 N.L.R.B. 1153 (1968). The postponement announcement must be carefully worded and cannot blame the union for the delay.

The Board has held that it was not objectionable for an employer to announce to its employees at a meeting two days before the election that it would have a dinner for the employees to celebrate the employer's victory in the upcoming election. *Raleigh County Comm'n on Aging, Inc*., 331 N.L.R.B. No. 119 (2000).

4. Paycheck Distribution. The NLRB's rule is that changes in paycheck processes, for purposes of influencing a vote, within 24 hours of the scheduled opening of the polls and ending with the closing of the polls, are prohibited and, upon the filing of a valid objection, the election will be overturned, absent a showing that the change was not for political purposes. *Kalin Construction Co., Inc.,* 321 N.L.R.B. No. 94 (1996). According to the Board, changes in the "paycheck process" encompass four elements: (a) the paycheck itself; (b) the time of the paycheck distribution; (c) the location of the paycheck distribution; and (d) the method of paycheck distribution. In *Dallas & Mavis Specialized Carrier Co.,* 346 N.L.R.B. No. 27 (2006), the Board held that an employer's change of its method of paycheck distribution on the first payday after the employer heard about its employees' union activities, violated § 8(a)(3).

5. Surveillance. Supervisors or agents of the employer cannot improperly watch the union activities of their employees. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938). Supervisors and employer agents cannot go to where union meetings are being held to check on employees' union activities. Supervisors and employer agents cannot create an impression of surveillance or persuade employees to engage in surveillance of other employees' union activities for the employer. *See Rogers Electric, Inc.,* 346 N.L.R.B. No. 53 (2006) (holding up highlighted telephone bill created impression of surveillance; while the openness of protected activity may be a relevant fact, the "Board does not require employees to attempt to keep their activities secret before an employer can be found to have created an unlawful impression of surveillance"); *Gold Kist, Inc.,* 341 N.L.R.B. No. 135 (2004) (finding employer violated § 8(a)(1) by more closely monitoring employees engaged in union activity, based on

statement by supervisor to employee who had publicly distributed union material that he was watching every move she was making).

Videotaping. In *Allegheny Ludlum Corp. and United Steelworkers of America*, 333 N.L.R.B. No. 109 (2001), the Board held that an employer may not lawfully include the images of an employee in a campaign videotape, where the videotape reasonably tends to indicate the employee's position on union representation, unless the employee volunteers to participate in the videotape under noncoercive circumstances. The Board set forth the requirements that must be met for an employer to lawfully solicit participation in an antiunion campaign video:

a. The solicitation must be in the form of a general announcement that discloses that the purpose of the filming is to use the employee's picture in a campaign video, and includes assurances that participation is voluntary, that nonparticipation will not result in reprisals, and that participation will not result in rewards or benefits;

b. Employees are not pressured into making the decision in the presence of a supervisor;

c. There is no other coercive conduct connected with the employer's announcement such as threats of reprisal or grants or promises of benefits to employees who participate in the video;

d. The employer has not created a coercive atmosphere by engaging in serious or pervasive unfair labor practices or other comparable coercive conduct;

e. The employer does not exceed the legitimate purpose of soliciting consent by seeking information concerning union matters or otherwise interfering with the statutory rights of employees.

In *Allegheny Ludlum Corp. v. NLRB,* 301 F.3d 167, 178 (3d Cir. 2002), the Third Circuit Court of Appeals held that the Board's requirements are a "rational resolution of the tension between the employer's First Amendment Rights and the employee's right to organize freely." The court further held that the Board's five-factor test (it did not address the second portion of the Board's decision, discussed below) both protects employees from direct solicitations by employers and allows employers to create antiunion campaign videos within the constraints of *Sony Corp. of Am.*, 313 N.L.R.B. No. 55 (1993).

If the employer wishes to include in a campaign videotape "stock" footage of employees filmed for another purpose and wishes to obtain employees' consent, including having the employees sign a written consent form, the safeguards set forth above must be observed, because a request that employees sign a consent form under those circumstances is equivalent to a request that employees participate in a campaign videotape. *Allegheny Ludlum Corp. and United Steelworkers of America*, 333 N.L.R.B. No. 109 (2001).

The Board further held that an employer may lawfully film employees, and present a campaign videotape including their images, without previously soliciting their consent to be filmed, only if the videotape, viewed as a whole, does not convey the message that the employees depicted therein either support or oppose union representation and the employer complies with the following requirements:

a. The employees were not affirmatively misled about the use of their images at the time of the filming;

b. The video contains a prominent disclaimer stating that the video is not intended to reflect the views of the employees appearing in it; and

c. Nothing in the video contradicts the disclaimer. When viewed as a whole, the video must not convey the message that employees depicted therein either support or oppose union representation.

While the employer is not required to obtain employees' consent to use their images in a video that does not convey a message that the employees either support or oppose the union, if the employer does chose to obtain employee consent for such videos, it may do so only in accordance with the requirements set forth for obtaining consent for use of employee images in antiunion videos. *Id*.

In *Robert Orr-Sysco Food Services*, 334 N.L.R.B. No. 122 (2001), *reversed on other grounds,* 338 N.L.R.B. 614 (2002), the Board held that the employer's practice of redirecting a security camera to videotape employees passing out pro-union literature in the period before a representation election was objectionable conduct meriting a new election. The Board held that the employer usually had the camera pointing in a different direction but redirected the camera to film the employees when they conducted handbilling every Friday for the eight weeks leading up to the election. The Board rejected the company's contention that it videotaped the handbilling because of safety concerns.

6. Polling. Polling employees concerning whether they want a union may or may not violate the Act. *Struksnes Constr. Co.*, 165 N.L.R.B. 1062 (1967). The purpose of poll must be to determine the truth of a union's claim of majority status and this must be explained to employees. Employees must be told there will be no retaliation against them and the poll must be a secret ballot. The employer cannot have created a coercive environment. If the employer polls employees and discovers that the union does represent a majority of employees in an appropriate unit, the employer can be forced to collectively bargain with the union without an election.

Caveat. An employer that conducts a poll to determine whether the union enjoys majority support may commit a ULP by conducting the poll if it does not have sufficient objective considerations to justify taking the poll. *Montgomery Ward & Co.*, 210 N.L.R.B. 717 (1974). This rule has been rejected by some courts, which would permit such a poll if the employer follows the *Struksnes* guidelines discussed above. *See Mingtree Restaurant v. NLRB*, 736 F.2d 1295 (9th Cir. 1984).

The Board has held that a "union truth quiz" conducted by an employer during an election campaign, which required employees to identify themselves and made a donation to the winner's favorite charity as a prize, was tantamount to a poll and violated Section 8(a)(1). *See Sea Breeze Health Care Center, Inc.*, 331 N.L.R.B. No. 149 (2000).

7. Restrictions on Union Activity: No Distribution/No Solicitation Rules. The employer may prohibit trespassing, soliciting, and distributing by its employees and outsiders if its rules are properly adopted and applied.

a. Employees. Under the NLRA, employees generally have the right to engage in verbal solicitation, so long as it is not during the working time of the solicitor or the employee being solicited. *See Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962). Thus, the Board typically holds that policies that prohibit employee solicitation at all times, or require employees to get a supervisor's permission to solicit during non-work times, are overbroad and violate the Act. Additionally, if a policy could reasonably be interpreted as being overbroad, the Board will likely find it to be presumptively unlawful, even if it could be subject to a differing interpretation that would make it appear to be facially valid. *See St. Joseph's Hospital*, 263 NLRB 375 (1982).

However, an employer's no distribution policy may forbid employees from distributing literature during working time. Additionally, a no distribution rule can prohibit distribution of literature at all times, but only in working areas of facility. *See Santa Fe Hotel, Inc.*, 331 N.L.R.B. No. 88 (2000) (entrances outside a hotel-casino were not working areas for the enforcement of a no distribution rule because only work that was

incidental to the hotel's main function of providing lodging and gambling was performed there; thus employer could not enforce no distribution rule there).

In *United Services Auto. Ass'n v. NLRB*, 387 F.3d 908 (D.C. Cir. 2004), the U.S. Court of Appeals for the District of Columbia affirmed the Board's determination that an employer's policy prohibiting solicitation and distribution of non-company materials "at any time in the work area and only during non-working hours in non-work areas" was invalid, noting that "under Board precedent, a no-distribution rule using the term 'working hours' (as opposed to 'working time') is presumptively invalid." The court also held that the rule was invalid because it had been interpreted by management as a blanket prohibition of employee solicitation and distribution of non-company materials even during non-work time and in non-work areas.

b. Nonemployee Organizers. In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the U.S. Supreme Court held that an employer lawfully banned union organizers from its parking lot. In an effort to unionize employees, the union organizers sought to pass out leaflets and place fliers on windshields of cars parked at the parking lot owned by the employer. The Court held that union organizers do not have the right to trespass on private property to get their message to employees. The Court stated that the NLRA confers rights only on employees, not on unions or their nonemployee organizers. Therefore, an employer cannot be compelled to allow distribution of literature by nonemployee organizers on its property.

In *Glendale Associates,* 335 N.L.R.B. 27 (2001), *enf'd* 347 F.3d 1145 (9th Cir. 2003), the Board noted that, in the absence of a private property interest, *Lechmere* does not control. The Board also noted that it will look to state law to determine if the employer has a sufficient property right to deny access to nonemployee union representatives. In *Fashion Valley Shopping Center,* 343 N.L.R.B. No. 57 (2004), the Board held that a shopping center's rule prohibiting speech, which urged customers to boycott one of the shopping center's stores, was an unlawful content-based restriction and not permitted under California law. Accordingly, the Board found that the shopping center violated § 8(a)(1) by maintaining this rule and when it excluded nonemployee union handbillers from the shopping center property.

In *Sparks Nugget Inc. v. NLRB*, 968 F.2d 991 (9th Cir. 1992), the Ninth Circuit Court of Appeals held that an employer need not accommodate nonemployee picketers on private property if they are trying to reach customers. In that case, the union's pickets and handbills were aimed at the general public, which could be reached in other ways, and not at employees, thus the exception to the rule that an employer need not accommodate nonemployee organizers did not apply.

c. Temporary Employees or Subcontractors. In *Southern Services. Inc. [Coca Cola Co.],* 300 N.L.R.B. 1154 (1990), *enf'd*, 954 F.2d 700 (11th Cir. 1992), the NLRB held that employees who regularly work on the premises of an employer other than their own (*i.e.*, employees of subcontractors) have the right to distribute union literature to fellow employees when they are on the property because of their employment relationship. In *NLRB v. Labor Ready Inc*., 253 F.3d 195 (4th Cir. 2001), the Fourth Circuit Court of Appeals held that a temporary placement firm committed an unfair labor practice by prohibiting construction workers who came to the office for job assignments from soliciting union support or distributing literature in the waiting room. The court affirmed an NLRB decision that the workers were employees covered by the NLRA despite language in their agreements with the temporary firm stating they were "deemed to have quit" at the end of each workday.

d. Employees From Other Work Locations. In *First Healthcare Corp. v. NLRB,* 344 F.3d 523 (6th Cir. 2003), the Sixth Circuit upheld a Board decision that it was unlawful for a company to deny off-duty union-represented employees who worked at one of the company's other locations access to the company's nonunion facilities for organizing purposes. The Board found that off-site and on-site employees share common interests such as wages, benefits, and other workplace issues that can be addressed by concerted action and concluded that the organizational rights of off-site employees give them access to the outside, non-working areas of the employer's other properties except where justified by business reasons. The Sixth Circuit upheld the Board's decision finding it had a reasonable basis in law and that substantial evidence supported the Board's conclusion that the employer violated § 8(a)(1) by denying offsite employees seeking to exercise their § 7 organizational rights access to its facilities. *See also ITT Indus. Inc. v. NLRB,* 413 F.3d 64 (D.C. Cir. 2005) (NLRB reasonably found that employer's denial of parking lot access to off-site employees seeking to engage in union organizational activities was ULP).

e. Disparate Enforcement. Employers may not enforce their no solicitation/ no distribution policies more stringently against unions or employees engaged in protected activity under § 7 of the Act than other employees or organizations.

Charitable Solicitations. The Board will not find unlawful disparate treatment if the nonunion solicitation the employer condones amounts to "no more than a small number of isolated beneficent acts." *Wal-Mart Stores, Inc*., 2001 WL 1155418 at *7, 2001 NLRB LEXIS 975 (NLRBGC, Dec. 14, 2001); *see also Hammary Mfg. Corp.*, 265 NLRB 57, fn. 4 (1982). In determining whether this exception applies, the Board will evaluate the "quantum … of incidents" at issue and the time over which it occurred. *Wal-Mart*, 2001 WL at *7 (since the solicitation was conducted by Wal-Mart employees, it would not count toward the Board's "quantum calculation").

The Board has held that three acts of employer condonation over a one-year period does not support a finding of unlawful disparate treatment. *See The Seng Company*, 210 NLRB 936, 941 (1974). Following the 9/11 terrorist attacks, many employers sought to hold fund raising events without running afoul of the law. The General Counsel of the NLRB issued a formal memorandum stating that, generally an employer may hold three beneficent acts per year without undermining an otherwise valid no solicitation rule. *See also Albertson's Inc. v. NLRB*, 301 F.3d 441, 452 (6th Cir. 2002) (vacating Board decision finding the employer violated § 8(a)(1) by barring members of two unions from distributing handbills outside of its grocery stores; company did not discriminate against the unions by permitting charitable organizations to solicit on its property, "[n]o relevant labor policies are advanced by requiring employers to prohibit charitable solicitations in order to preserve the right to exclude nonemployee distribution when access to the target audience is otherwise available.") (citing *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457, 465 (6th Cir. 1996)); *but see K-Mart Corporation*, 313 NLRB 50, 58 (1993) (employer acted unlawfully in ousting union solicitors on the same day it allowed solicitation by: (1) the Salvation Army; (2) the promoter of a ballot initiative; and (3) an individual seeking donations on behalf of a religious organization).

f. Adoption of No Solicitation Rule During Organizing Campaigns. In 1984, the Board ruled that the adoption of a no solicitation rule during a union organizing drive was not *per se* unlawful. *Brigadier Indus*., 271 N.L.R.B. 656 (1984). This remains risky, however, and it may be better to implement a no solicitation policy prior to any organizing drive as long as it is uniformly enforced. *See Fairfax Hosp. v. NLRB*, 14 F.3d 594 (4th Cir. 1993) (unpublished decision) (hospital had unlawfully promulgated and

disparately enforced new solicitation and distribution rules during an organizing drive; nurses were told not to distribute pro-union literature while hospital supervisors were permitted to hand out antiunion literature in the same area). *But see Delta Brands, Inc.,* 344 N.L.R.B. No. 10 (2005) (the mere presence of an overbroad no solicitation rule in a much larger document, with no showing that any employee was affected by the rule's existence, no showing of enforcement, and no showing of any mention of the rule was not sufficient to set aside a union election).

g. E-Mail Policies. In *The Prudential Insurance Company of America*, 2002 WL 31493320, 2002 NLRB LEXIS 566 (N.L.R.B. Div. of Judges 2002), the ALJ held that the company's e-mail policy, which prohibited employees from using the e-mail system for union-related communications but permitted the company to use it for antiunion communications, was an overly broad prohibition that unlawfully infringed on the employees' rights to choose whether to be represented by a union. The ALJ then held that the company's e-mail policy gave it a substantial advantage in the representation election and ordered that the election, which the company won, be set aside. In this case, the company's computer network was a primary method of communication between Prudential and its agents. Therefore, traditional methods of communication by a union during an organizing campaign, such as mail and home visits, were ineffective. The ALJ's reasoning may not necessarily apply to more traditional employment settings. This decision is being appealed to the NLRB, which has not previously ruled on this issue.

8. Wearing of Union Insignia. In *NLRB v. Malta Constr. Co.*, 806 F.2d 1009 (11th Cir. 1986), the court held that firing an employee for wearing union insignia on a hard hat during a union campaign was a ULP. The dissent argued that NLRB gave "short shrift" to the employer's property interest argument and the fact that the employer had uniformly prohibited the wearing of decals or stickers on company equipment. *See also Wal Mart v. NLRB*, 400 F.3d 1093 (8th Cir. 2005) (employee did not engage in solicitation when he entered store while off-duty wearing t-shirt that read "Union Teamsters" on front and "Sign a card – Ask me how!" on back, thus, punishing him for wearing the shirt was ULP).

In *Hertz Corp.*, 305 N.L.R.B. No. 47 (1991), however, the Board upheld an employer's policy barring employees from wearing union pins on their uniforms. In *Hertz*, the employer had in place a policy that the only acceptable pins for employees to wear were nametags, company promotional tags, and award pins. Acknowledging that Hertz employees had been observed wearing Christmas and St. Patrick's day pins, the Board held that such lapses "in an otherwise consistent application of a detailed uniform policy do not persuade us that there was inconsistent and discriminatory enforcement." *See also Eastern Omni Constructors v. NLRB*, 170 F.3d 418 (4th Cir. 1999) (the Fourth Circuit reversed the NLRB and held that an employer legally restricted employees from wearing unauthorized union decals on their hard hats); *Starwood Hotels,* 348 NLRB No. 24 (Sept. 29, 2006), (Board upheld a hotel's right to prohibit the wearing of 2" x 2" HERE buttons in certain guest areas because it interfered with the employer's image and "special atmosphere." The Board also upheld the prohibition in the hotel's kitchen because of the employer's legitimate health and safety concerns (food contamination)).

9. Protected Concerted Activities. Section 8(a)(1) also prohibits acts against employees who engage in protected concerted activities. These activities need not be union related. Section 7 of the Act gives employees the right to "engage in other concerted activities [besides union activity] for the purpose of collective bargaining or other mutual aid or protection." Protected concerted activities involve employees joining in concert to affect wages, hours, and other terms and conditions of employment. Examples:

- Strikes (*i.e.*, refusals to work) to protest wage rates. *NLRB v. Ridgeway Trucking Co.*, 622 F.2d 1222 (5th Cir. 1980).
- Refusal to work overtime on a particular occasion. *Polytech, Inc.*, 195 N.L.R.B. 695 (1972).
- Refusal to work because of heat or cold. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).
- Complaints about dangerous working conditions. *Wray Electric Contracting, Inc.*, 210 N.L.R.B. 757 (1974).
- Refusal to cross a picket line at the facility of another employer. *Business Services by Manpower, Inc.*, 272 N.L.R.B. 827 (1984), *enforcement denied*, 784 F.2d 442 (2d Cir. 1986).
- Criticizing management and company policies during a group meeting. *NLRB v. Caval Tool Div., Chromalloy Gas Turbine Corp.*, 262 F.3d 184 (2d Cir. 2001) (employee engaged in protected concerted activity when she spoke up during a group meeting and challenged the employer's application of a new break policy).

a. Employee Conduct May Cause Loss of § 7 Protection. The Board has held that an employee who engages in otherwise protected activity loses the protection of the Act if he or she engages in opprobrious conduct. *See Atlantic Steel Co.*, 245 NLRB 814, 816-17 (1979) (setting forth four factors to be considered in determining when an employee has lost the protection of the Act: (a) the place of the discussion; (b) the subject matter of the discussion; (c) the nature of the outburst; and (d) whether the outburst was, in any way, provoked by the employer's unfair labor practice); *but see Felix Indus., Inc.*, 339 N.L.R.B. No. 32 (2003) (employee who used obscene language toward his supervisor when discussing why he had not received a night-shift differential pay under the CBA did not lose the protection of the Act because of this outburst; employee was provoked by his supervisor's overt hostility toward the employee's protected conduct, which included the threat of termination for having engaged in protected conduct and outburst would not have occurred but for this hostility), *enf'd,* 2004 WL 1498151, 2004 U.S. App. LEXIS 13793 (July 2, 2004); *Stanford Hote*l, 344 N.L.R.B. No. 69 (2005) (employee did not lose § 7 protection because profane outburst was provoked by supervisor's unlawful threats to fire him if he did not declare himself ineligible for union representation).

b. "Concerted" Activity. In *Meyers Industries, Inc.*, 281 N.L.R.B. No. 118 (1986), *aff'd*, 835 F.2d 1481 (D.C. Cir. 1987) (*Meyers II*), and 268 N.L.R.B. 493 (1984) (Meyers I), the Board reversed prior decisions holding that even activities of an individual employee may be protected under the Act if the employee's action directly involved the furtherance of rights that benefit fellow employees and reestablished that "concerted" activity requires that an employee be acting in concert with others, or on the authority of others, and not solely by and on behalf of the employee himself, to be protected by the Act. *See also Citizens Investment Services Corp. v. NLRB,* 430 F.3d 1195 (D.C. Cir. 2005) (employee engaged in protected concerted activity when he complained about the company's compensation of senior financial analysts; evidence showed he represented other employees' concerns about the compensation package, and not just his own concerns).

The mere assertion by an employee that others will join in a work stoppage is not enough to show actual authority on behalf of others. *Mannington Mills, Inc.*, 272 N.L.R.B. 176 (1984). Even when there has been concerted conduct with others, the employee's activity is not "protected" unless it is shown that the employer knew of the involvement of others.

Center Ridge Co., 276 N.L.R.B. No. 15 (1985); *compare with Every Woman's Place, Inc.*, 282 N.L.R.B. No. 48 (1986), *enf'd*, 833 F.2d 1012 (6th Cir. 1987) (social worker discharged after calling the Wage/Hour Division to question her employer's holiday practices was found to be engaged in protected concerted activity because her action "was a logical outgrowth of the original protest by three employees").

The U.S. Supreme Court held in *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), that even an individual who acts alone in protesting a condition of employment is engaged in protected activity if she or he is reasonably invoking a right under a collective bargaining agreement. (This is the so-called "Interboro Doctrine.") As explained by the Board in *Meyers II,* this is because the individual's action is an extension of the "concerted" action that produced the agreement. The invocation of the contract right must also be both reasonable and honest. *ABF Freight Sys., Inc.*, 271 N.L.R.B. 35 (1984).

Employees who refuse to work because of a protected concerted protest cannot be discharged; rather, they must be treated as economic strikers. While economic strikers may be permanently replaced when engaged in an economic strike, if a striking employee offers to return to work prior to being permanently replaced, the employee must be offered the job back.

10. "Chilling" Employees' § 7 Rights. The Board has held that some actions by employers "chill" an employee's § 7 right to engage in protected concerted activity, such as:

- Prohibiting employees from discussing their paychecks with other employees. *Lampi, LLC*, 322 N.L.R.B. No. 81 (1996).
- Implementing overly broad confidentiality policies. *See Cintas Corp.,* 344 N.L.R.B. No. 118 (2005) (confidentiality policy that prohibited the discussion of any information related to employees could reasonably be seen as restricting discussion of wages and other terms and conditions of employment and could have a chilling effect on § 7 rights; thus, it violated the NLRA); *Claremont Resort and Spa,* 344 N.L.R.B. No. 105 (2005) (rule prohibiting negative conversations would reasonably be construed by employees to bar them from discussing with their co-workers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities and was, therefore, illegal); *Double Eagle Hotel & Casino,* 414 F.3d 1249 (10th Cir. 2005) (affirming Board order in part, to the extent it prohibited casino employees from discussing tip sharing rule around customers; also affirming order holding that employer's confidentiality policy, which prohibited employees from discussing wages and working conditions, violated employees' § 7 rights), *cert. denied,* 126 S. Ct. 1331 (2006).
- Prohibiting employees from making complaints to employer's clients. *See Guardsmark, LLC,* 344 N.L.R.B. No. 97 (2005) (rule that prohibited employee from registering complaints with any representative of the client "explicitly trenches upon the right of employees under Section 7 to enlist the support of an employer's clients or customers regarding complaints about terms and conditions of employment"); *Bowling Transportation, Inc. v. NLRB,* 352 F.3d 274 (6th Cir. 2003) (employees engaged in protected concerted activity when they complained to the company's only customer about the company's safety bonus program and complained about their discharges).
- Forbidding employees from opening their paychecks while at work. *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502 (8th Cir. 1993).

11. Breaches of Confidentiality. Generally, an employee is entitled to use, for self-organizational purposes, information and knowledge that comes to his or her attention in the normal course of work. *Ridgely Mfg. Co.*, 207 N.L.R.B. 193 (1973), *enf'd*, 510 F.2d 185 (1975). If the employer has established a workplace rule concerning confidentiality of some of this information, the employee's interest in using the information must be weighed against any legitimate business justification the employer has in keeping the information confidential. *Jeannette Corp. v. NLRB*, 532 F.2d 916 (3d Cir. 1976). If, however, an employer does not treat the information as confidential, an employee who comes across the information openly or in the regular course of work may use the information for self-organization purposes. *L.G. Williams Oil Co.*, 285 N.L.R.B. 418 (1987).

In contrast, if an employee steals or even "happens upon" information that the employer considers confidential, and that employees are prohibited from disclosing, the courts may not protect the employee's use of such information. *See, e.g., Texas Instruments v. NLRB*, 637 F.2d 822 (1st Cir. 1981). Furthermore, an employee who takes confidential wage information from the employer's private files and then lies about the source of the information could be lawfully terminated, despite the existence of an unlawful workplace rule forbidding employee discussion about wages. *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359 (5th Cir. 1990).

12. Rules Prohibiting Harassment. In *Martin Luther King Memorial Home, Inc. d/b/a/ Lutheran Heritage Village-Livonia,* 343 N.L.R.B. No. 75 (2004), the Board held, in a 3-2 decision, that an employer's rules prohibiting "abusive and profane language," "harassment," and "verbal, mental, and physical abuse" were lawful because they were intended to maintain order in the employer's workplace and did not explicitly or implicitly prohibit § 7 activity. In reaching this conclusion, the Board agreed with the Court of Appeals for the District of Columbia's decision in *Adtranz ABB Daimler-Benz Transportation, N.A., Inc. v. NLRB,* 253 F.3d 19 (D.C. Cir. 2001), which held that a rule prohibiting "abusive language" is not unlawful on its face.

The Board noted that in *Adtranz*, the court recognized that an employer has a legitimate right to establish a "civil and decent work place" and to adopt rules banning profane language because employers are subject to civil liability under federal and state law should they fail to maintain a workplace fee of harassment. The Board further noted that the court recognized that abusive language can constitute verbal harassment triggering liability under state or federal law. The Board agreed with the *Adtranz* court that there is no basis for a finding that a reasonable employee would interpret a rule prohibiting abusive language as prohibiting § 7 activity. *Id.* Further, the Board held that verbal abuse and profane language are not an inherent part of § 7 activity. *Id.* The Board also held that the question of whether particular employee activity involving verbal abuse or profanity is protected by § 7 turns on the specific facts of each case and that, absent the application of a rule prohibiting abusive language to an employee's protected activity, the Board will not presume the rule is unlawful. For the same reasons, the Board found the employer's rule prohibiting harassment to be lawful.

In *Lutheran Heritage,* the Board applied the standard set out in *Lafayette Park Hotel*, 326 NLRB 824 (1998), *enf'd,* 203 F.3d 52 (D.C. Cir. 1999), in which the Board held that to determine whether the mere maintenance of certain work rules violates the NLRA, the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their § 7 rights. *See also Community Hospitals of Central California v. NLRB,* 335 F.3d 1079 (3d Cir. 2003) (overruling a Board determination that provisions in an employee handbook, which prohibited, among other things, insubordination and disrespectful conduct, were an unfair labor practice. The court rejected the Board's argument that the term "other disrespectful conduct" could be interpreted to apply to union organizing activity. The court held that the term applied to incivility and outright insubordination.)

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B. Domination or Interference with Labor Organization (8(a)(2)). An employer cannot dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.

1. Recognition of Union Representing Minority of Employees. An employer cannot recognize and deal with a union representing a minority of the employer's employees even if it does so in good faith (an exception is created for the construction industry). *International Ladies' Garment Workers' Union, AFL-CIO v. NLRB*, 366 U.S. 731 (1961).

2. Dues Check-off Authorization. An employer cannot check off union dues to a union without an employee having signed a valid check-off authorization. *Western Auto Associate Store*, 143 N.L.R.B. 703 (1963).

3. Closed Shops. It is unlawful to enter into a closed shop agreement or illegal hiring hall in which an employer requires all employees to be union members when they are hired. *Meat Cutters Local 421 (Great Atlantic & Pacific Tea Co.)*, 81 N.L.R.B. 1052 (1949).

4. Employee Involvement Committees. It is illegal for an employer to dominate or interfere with the formation or administration of any labor organization or to contribute financial or other support to it. A labor organization is any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and that exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. § 2(5) of the Act.

In *Electromation, Inc.*, 309 N.L.R.B. No. 163 (1992), *aff'd*, *Electromation, Inc. v. NLRB*, 35 F.3d 1148 (7th Cir. 1994), the NLRB upheld an administrative law judge's decision that the employer unlawfully dominated employee action committees by proposing them, organizing them, providing a place for them to meet, paying the employees for time lost from work, and providing them with pens, paper, and a calculator. The employer had set up the employee committees as a communications device to address serious morale problems arising out of a change of the employer's absentee and attendance program. The employer had a lengthy history of meeting with employees face-to-face to address work-related issues. The committees were advisory only and were formed without any knowledge of union organizing activities. Nevertheless, the Board held that the employer imposed on the employees its own unilateral form of bargaining. The Board ordered Electromation to "immediately disestablish" the committees and stop assisting and/or supporting them.

However, all hope is not lost for employers desiring to work directly with their employees in voluntary employee action committees. The Board's decision indicated that such violations of the NLRA will be determined on a case-by-case basis by looking at the particular facts of each case, and that this decision does not reflect a holding that labor-management "employee involvement committees" are *per se* unlawful. *See also E.I. DuPont de Nemours & Company*, 311 N.L.R.B. 893 (1993) (employer unlawfully dominated an employee committee by retaining veto power over any action the committee might wish to take and on who could serve on each committee, and by retaining the power to abolish the committee at will); *Keeler Brass Automotive Group*, 317 N.L.R.B. No. 161 (1995) (employer unlawfully controlled and dominated an employee grievance committee, thus rendering it a "labor organization" under the Act). *But see NLRB v. Peninsula General Hospital*, 36 F.3d 1262 (4th Cir. 1994) (reversing the Board's order to disband an employee participation committee, noting that the critical question is whether the committee exists to deal with the employer over matters affecting employment and that the employer does not necessarily deal with committees by communicating with them, even about working conditions).

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In *Crown, Cork & Seal Co.*, 334 N.L.R.B. No. 92 (2001), the NLRB held that an employer's use of a management system that delegates substantial authority to employees did not involve unlawful management domination of an employee committee. The Board found that the committees in this case were not labor organizations because they essentially had supervisory authority that is traditionally given to an individual supervisor. Thus the committees made decisions that were reviewed by higher levels of management, as individual supervisors would do in a more traditional setting. The Board found that this type of decision-making, subject only to review by higher levels of management, did not constitute "dealing with" management. Accordingly, the committees were not labor organizations within the meaning of the NLRA.

An employer should consider whether the following factors are present in any employee involvement committees in existence:

a. Is the purpose of the committee to deal with the company? An employer may not be dealing with a committee when the purpose of the committee is to investigate facts, generate ideas, and elicit suggestions for transmission to management. *Airstream v. NLRB*, 877 F.2d 1291 (6th Cir. 1989), *order entered by Airstream v. NLRB,* 914 F.2d 255 (6th Cir. 1999); *NLRB v. Streamway*, 691 F.2d 288 (6th Cir. 1982).

b. The subject matter of the dealings must concern grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. Therefore, issues relating to product quality, customer satisfaction, and production efficiency may not be considered terms and conditions of work.

c. Some courts have held that the employees serving on an employee involvement committee must be acting in a representational capacity in order for the committee to be a labor organization.

Until there is further Board or court guidance, employers may consider the following actions short of ceasing all employee involvement committees:

a. Deal with employees as a whole, rather than through representational committees.

b. Deal with specific employees on an individual, or perhaps committee basis, because of the specific talents of the selected individuals, with specific instructions that the employees are not acting as representatives of other employees.

c. Make certain that any committees established are only for the purpose of facilitating upward and downward communication of information on ideas without any "negotiation" or dealing with the employees in regard to the ideas.

d. Employee groups may discuss quality, production, or efficiency issues, but they may not discuss terms or conditions of employment, *i.e.*, wages, hours, and working conditions.

e. Deal with employees in brainstorming sessions.

f. If the employee group has authority to make the decision as opposed to recommendations to management, this is arguably not illegal.

C. Discrimination Against Employees Based on Union Membership (§ 8(a)(3)). An employer cannot discriminate against employees (or prospective employees) in order to encourage or discourage membership in a labor organization. An employee cannot be discharged because of lawfully engaging in union activity – *i.e.*, signing a union card, properly soliciting other employees to sign a union card, engaging in a lawful strike. *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954). Perjury does not bar a union employee's claim that she or he was

discharged for union activity. *See Earle Industries, Inc*., 315 N.L.R.B. No. 45 (1994), *enforcement denied*, 75 F.3d 400 (8th Cir. 1996).

D. Analysis of Claims of Violations of the Act (*Wright Line* Test). The Board utilizes the following test in discharge cases: first the General Counsel (prosecutor) is required to make a *prima facie* showing of sufficient evidence to support the inference that protected conduct was a motivating factor in the employer's decision. If this is established, the burden shifts to the employer to show that the same action would have taken place even in the absence of the protected conduct. *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), *overruled in part by Department of Labor v. Greenwich Collieries,* 512 U.S. 267 (1994); *Wright Line, Inc*., 251 N.L.R.B. 1083 (1980), *enf'd by* 662 F.2d 899 (1st Cir. 1981). *See also Citizen Investment Services Corp. v. NLRB,* 430 F.3d 1195 (D.C. Cir. 2005) (affirming determination under *Wright Line* analysis that employee was discharged for protected concerted activity when he complained about compensation package of employees in his job category); *NLRB v. Rockline Indus., Inc*., 412 F.3d 962 (8th Cir. 2005) (enforcing NLRB determination that employer's suspension and termination of employee was ULP; disparate treatment of employee in discipline and termination compared to treatment of employees who did not support union was substantial evidence that discipline and termination were motivated by antiunion animus); *but see Framan Mechanical Inc.,* 343 N.L.R.B. No. 53 (2004) (reversing the ALJ's decision and finding that the employer met its burden of showing that it would have laid off the employees in question even in the absence of their union activities; recognizing the employer's right to adjust its workforce to attempt to recoup losses on a construction project).

E. Discharge of Illegal Aliens for Involvement in Union Organizing Activities. An employer who discharges an employee in retaliation for involvement in a union organizing campaign may be subject to NLRB sanctions even if the person discharged is an illegal alien. The U.S. Supreme Court has held, however that illegal aliens are not entitled to back pay awards for being discharged in violation of the NLRA for "years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by criminal fraud." *See Hoffman Plastic Compounds Inc. v. NLRB*, 535 U.S. 137 (2002). In *Hoffman*, the company discharged several employees because of their involvement in a union organizing campaign. The NLRB awarded back pay to the employees. In the process of determining the appropriate back pay amount, it was disclosed that one of the employees was an illegal alien. The case made its way to the Supreme Court, which held that the Immigration Reform and Control Act 1986 (IRCA) foreclosed an award of back pay to the illegal alien. The Court upheld other sanctions imposed by the NLRB, including a cease and desist order and a notice requirement. The DOL has stated that this decision does not affect the payment of earned wages under the Fair Labor Standards Act (FLSA). *See "General Counsel Issues Memo on Hoffman Describing Effects on Procedures, Remedies," Daily Labor Report,* (BNA), August 1, 2002. The General Counsel also noted that the Supreme Court reaffirmed that undocumented workers are still employees under the NLRA and that employers can be liable for unfair labor practices against these workers. *Id.*

F. Discrimination Based on Employee Charge or Testimony (§ 8(a)(4)). Section 8(a)(4) prohibits an employer from discharging or otherwise discriminating against an employee because the employee filed charges or gave testimony under the Act. Retaliation against an employee because the employee gave an affidavit to the NLRB is also prohibited. *Rock Hill Convalescent Center*, 226 N.L.R.B. 881 (1976), *enf'd*, 585 F.2d 700 (4th Cir. 1978). At one time the Board held that the burden is on the employer to show compelling reasons why employees should not be given time off from work to attend an NLRB hearing. *E.H. Ltd.*, 227 N.L.R.B. 1107 (1977), *rev'd*, 600 F.2d 930 (D.C. Cir. 1979). The Board subsequently overruled *E.H. Ltd.* and returned to its decision in *Standard Packaging*, which placed the burden of proof on the General Counsel. *Ohmite Mfg. Co*., 290 N.L.R.B. No. 130 (1988).

VIII. UNFAIR LABOR PRACTICES - UNION

A. Restraint or Coercion of Employees in Exercising § 7 Rights (§ 8(b)(1)(A)). Section 8(b)(1)(A) prohibits restraint or coercion against employees in the exercise of their § 7 rights. This is the equivalent of employer § 8(a)(1) violation, except that interference is not prohibited, only restraint and coercion. There is also no derivative § 8(b)(1)(A) violation. *National Maritime Union of America*, 78 N.L.R.B. 971 (1948), *enf'd*, 175 F.2d 686 (2d Cir. 1949).

Examples:

1. Fining an employee who has resigned from the union. *NLRB v. Textile Workers, Local 1029, Granite State Joint Board*, 409 U.S. 213 (1972).

2. Fining a member who refused to recognize an illegal strike. *Retail Clerks Union, Local 1179*, 211 N.L.R.B. 84 (1974), *enf'd*, 526 F.2d 142 (9th Cir. 1975); *Communications Workers of America and Susan L. Irving and Margaret L. Eichner,* 340 N.L.R.B. No. 2 (Aug. 29, 2003) (finding union committed unfair labor practice when it fined members for refusing to work mandatory overtime).

3. Engaging in violent acts on a picket line. *Union Nacional de Trabajadores*, 219 N.L.R.B. 405 (1975), *enf'd,* 540 F.2d 1 (1st Cir. 1976).

4. Preventing ingress and egress from a picketed facility. *Union Nacional de Trabajadores*, 219 N.L.R.B. 414 (1975), *enf'd,* 540 F.2d 1 (1st Cir. 1976).

5. Threats of bodily harm because of union considerations. *Rockville Nursing Center*, 193 N.L.R.B. No. 149 (1971), *overruled on other grounds, Beverly Enterprises,* 313 N.L.R.B. No. 54 (1993).

6. Processing only union members' grievances when a union is the collective bargaining representative of an employer's employees. *Peerless Tool and Engineering Co*., 111 N.L.R.B. 853 (1955), *enf'd, NLRB v. Die & Tool Makers Lodge No. 113,* 231 F.2d 298 (1956).

7. Superseniority for stewards can be unlawful if goes beyond layoff and recall. *Dairylea Cooperative, Inc*., 219 N.L.R.B. 656 (1975), *enf'd, NLRB v. Milk Drivers and Dairy Employees Local 338,* 531 F.2d 1162 (2d Cir. 1976).

8. Photographing employees during the union's distribution of campaign literature. *See Randall Warehouse of Arizona, Inc*., 347 NLRB No. 56 (2006) ("In the absence of a valid explanation conveyed to employees in a timely manner, photographing employees engaged in Section 7 activity constitutes objectionable conduct whether engaged in by a union or an employer.")

B. Restraining or Coercing Employer (§ 8(b)(1)(B)). Section 8(b)(1)(B) prohibits a union from restraining or coercing an employer in the selection of representatives for purpose of collective bargaining or adjustment of grievances. A union cannot fine a supervisor/member for his or her actions in enforcing a contract on behalf of the employer. Additionally, the union cannot fine a supervisor/member for crossing a picket line to perform normal supervisory functions. *Florida Power & Light Co. v. IBEW*, 417 U.S. 790 (1974). The union can, however, fine a supervisor/member who crosses picket line and performs unit work during a lawful strike.

C. Causing Employer to Violate § 8(a)(3) (§ 8(b)(2)). Section 8(b)(2) prohibits a union from attempting to or causing an employer to violate § 8(a)(3) of Act. A union cannot force an employer in a right-to-work state to discharge nonunion employees because they are not union members. A union cannot operate an exclusive hiring hall giving preference to union members in referral. *Plumbers and Pipe Fitters Local 32 v. NLRB*, 50 F.3d 29 (D.C. Cir. 1995); *J. Willis & Son Masonry*, 191 N.L.R.B. 872 (1971). A union cannot cause an employer to discharge an

employee because that employee opposed the union during a union organizing attempt or because she or he opposed an incumbent union official. *Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 204 N.L.R.B. 700 (1973), *enf'd*, 506 F.2d 1321 (D.C. Cir. 1974).

D. Secondary Boycott (§ 8(b)(4)). Section 8(b)(4) covers a union's "secondary boycott" and prohibits a labor organization from engaging in, inducing, or encouraging employees and from threatening, coercing, and restraining any person (includes employers, private or public) for a proscribed object. Even though this is the so-called secondary boycott section of the Act, primary action can violate § 8(b)(4)(A), (C), or (D). However, secondary action is needed to violate § 8(b)(4)(B). To be secondary, the action must be directed against an entity other than the one with whom the labor organization has the dispute.

An employer may prevent "affinity group shopping" by union members. *See Pye v. Teamsters Local Union No. 122*, 875 F. Supp. 921 (D. Mass. 1995), *aff'd*, 61 F.3d 1013 (1st Cir 1995) (rejecting union members' claim that they were "just shopping" when they entered the mall for mass shopping sprees of small ticket items and holding that this practice, known as "affinity group shopping," may constitute an unlawful secondary boycott under the NLRA).

A single asset purchase may satisfy "doing business" for purposes of § 8(b)(4)(ii)(B). *See Taylor Milk v. International Brotherhood of Teamsters*, 248 F.3d 239 (3d Cir. 2001) ("a continuing long-term negotiation over the purchase of a new asset from a neutral third party meets the 'doing business' requirements" of § 8(b)(4)(ii)(B)).

Actions that might be unlawful if taken through picketing may be lawful if no picketing occurs and handbilling takes place instead.

Common Situs Picketing. Common situs picketing may be lawfully accomplished if the picketing is strictly limited to times when the situs of dispute is located on the secondary employer's premises; at the time of the picketing, the primary employer (that is, the employer with whom the labor organization has the dispute) is engaged in its normal business at the situs; the picketing is limited to places reasonably close to the location of the situs; the picketing discloses clearly that the dispute is with the primary employer. *Sailors' Union of the Pacific (Moore Dry Dock Company)*, 92 N.L.R.B. 547 (1950).

A union cannot violate reserved gates that are properly established and utilized at a common situs because this shows that its dispute is not with the primary employer but rather to embroil neutral or secondary employers in the dispute between the primary employer and the union. A union may picket an employer that has allied itself with a struck employer by performing work that would normally be performed by the striking employees. *NLRB v. Business Machine and Office Appliance Mechanics Conference Board, Local 459*, 228 F.2d 553 (2d Cir. 1955).

Jurisdictional disputes need not involve two unions. This applies when the union is seeking to assign work that the employer has assigned to nonunion employees. *Teamsters Local 175*, 107 N.L.R.B. 223 (1953), *enf'd,* 506 F.2d 1321 (D.C. Cir. 1974). A union cannot enmesh neutrals in a dispute between the primary employer and the union by way of prohibited conduct. *NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675 (1951).

When a union is engaged in primary picketing to protest an employer's payment of substandard wages and benefits or some other legitimate dispute, if such picketing is done properly it can continue indefinitely. *Plumbers Local Union No. 68*, 220 N.L.R.B. 157 (1975), *vacated by Bexar Plumbing Co., Inc. v. NLRB,* 536 F.2d 634 (5th Cir. 1976).

E. Excessive Membership Fees (§ 8(b)(5)). Section 8(b)(5) prohibits excessive or discriminatory membership fees when employees are subject to a union security agreement. This

section tends to prohibit union's use of initiation fees as a weapon to limit membership. Even if a membership fee is not excessive it can still be unlawful.

F. Featherbedding (§ 8(b)(6)). Section 8(b)(6) prohibits a union from causing or attempting to cause an employer to pay for services that are not performed (*i.e.*, featherbedding). This section has been emasculated by Board and court decisions, and if any work at all is performed, it is likely no violation will be found. *NLRB v. Gamble Enterprises*, 345 U.S. 117 (1953); *American Newspaper Publishers Association v. NLRB*, 345 U.S. 100 (1953).

G. Unlawful Picketing (§ 8(b)(7)). Prohibits a union from picketing or threatening to picket any employer when the object is forcing or requiring an employer to recognize or bargain with a labor organization under the following circumstances:

1. Picketing for recognition is prohibited by § 8(b)(7)(A) when an employer has lawfully recognized another labor organization, and, therefore, no question concerning representation can be raised.

2. Picketing for recognition is prohibited by § 8(b)(7)(B) when a valid election has been held within one year among the employees for whom the union is attempting to become the bargaining representative.

3. Picketing is unlawful pursuant to § 8(b)(7)(C) when picketing for recognition has been conducted, without a petition being filed with the Board, in excess of a reasonable period of time, not to exceed thirty days.

A union can picket with language stating that an employer "does not employ members of" or "have a contract with" a labor organization for more than thirty days unless an effect of such picketing is to induce any individual employed by any other person in the course of his or her employment not to pick up, deliver, or transport any goods or not to perform any services. *Local Joint Executive Board of Hotel and Restaurant Employees and Bartenders International Union of Long Beach and Orange County*, 135 N.L.R.B. 1183 (1962).

If a representation petition is filed within a reasonable time under § 8(b)(7)(C) and a ULP charge has been filed against the picketing union, an expedited election is held without consideration of the union's showing of interest.

H. Section 8(e). Section 8(e) prohibits a labor organization and any employer from entering into any contract or agreement in which the employer agrees to cease doing business with any other person or refrain from dealing in the products of another employer. Exceptions are created for the apparel and clothing industry. Exceptions are also created for the construction industry involving contracting or subcontracting of work to be done at the site of the construction. The Board will closely scrutinize what constitutes "on site" work. A ULP charge may be filed against both unions and employers under § 8(e).

In *Heartland Indus. Partners,* 2005 WL 1457444, 2005 NLRB LEXIS 271 (N.L.R.B. Div. of Judges, June 16, 2005), Heartland, a private equity firm that invests in industrial manufacturing companies, entered into an agreement with the United Steelworkers of America, which provided that if, at any time following six months after Heartland acquired a company, the union notified Heartland of its intent to organize any of the facilities of the acquired company, Heartland would cause the company to execute an agreement that would, among other things grant recognition to the union based on card check procedures. One of the companies acquired by Heartland challenged this agreement, claiming it violated § 8(e). The ALJ rejected this argument, holding that the agreement did not require Heartland to cease doing business with any other person.

IX. UNFAIR LABOR PRACTICE PROCEDURES AND PENALTIES

A. Unfair Labor Practice Procedure. Section II of the NLRA establishes the powers of the Board and the Regional offices with respect to hearings and investigations. An employer or a labor organization or the agents of either file a charge with the NLRB alleging a violation of Act. The section has a six-month statute of limitations. (In 1984, the Board ruled that in a discharge case, the six-month period begins to run on the date employee was notified, rather than the date the discharge took effect. *U.S. Postal Service Marina Mail Processing Center*, 271 N.L.R.B. 397 (1984)). The case is assigned to a Regional field examiner or field attorney to investigate. The Board agent first takes evidence offered by the charging party, and interviews and takes affidavits from all witnesses who support the charging party's charge. If a *prima facie* case is made, a Board agent contacts the charged party to see if the charged party wishes to present evidence. The charged party must decide whether it is in its best interest to present evidence at this time, or to wait and see if complaint issues and then present evidence at trial.

The charged party must decide whether to present evidence by permitting the Board agent to take affidavits of the employee's witnesses, having an attorney for the charged party take affidavits and submit them to the Board, permitting a Board agent to interview witnesses but take no affidavits, submitting a written position statement, or some combination of above. After the Board agent completes the investigation, she or he reports findings to his or her superiors, and the Regional Director decides whether to prosecute. If the Region decides that no violation of the Act exists, it will seek a withdrawal of the charge and, absent withdrawal of the charge, will dismiss it.

If the charge is dismissed, an appeal may be filed with General Counsel in Washington. No appeal may be filed if the charge is withdrawn. Section 3(d) places in the General Counsel "final authority," on behalf of the Board, with respect to the investigation of charges and issuance of complaints. If the Region believes a violation of Act exists, it will issue the complaint absent settlement. The Region will seek posting of the Board notice and affirmative action such as reinstatement, back pay, and good faith bargaining, where appropriate. The charged party may be able to enter into non-Board settlement outside of the Board processes without posting a notice and without reinstatement of the alleged discriminatee. In a non-Board settlement, the charging party withdraws the charge with the Board's approval.

If no settlement is reached, the complaint generally issues, and the case is litigated before a NLRB administrative law judge. The complaint cannot be broader than the underlying charges. *Drug Plastics & Glass Co., Inc. v. NLRB*, 44 F.3d 1017 (D.C. Cir. 1995).

Cases are usually set for trial about three to six months after the complaint issues. After the trial, both sides usually write briefs to the judge. In the usual case, an administrative law judge issues a decision approximately three to ten months after case is tried. The decision of the administrative law judge may be appealed by the losing party or parties to the Board. The Board has initiated "bench decisions" in certain cases. In a "bench decision" the administrative law judge rules at the close of the hearing, usually without giving the parties the opportunity to file briefs.

If the charged party loses before the Board, it can refuse to comply with the Board order and can litigate the case before a federal appeals court. Section 10(f) of the Act provides that any person aggrieved by a final order of the Board granting or denying, in whole or in part, the relief sought may obtain a review of such order in any appropriate court of appeals. Litigation to decision before a court of appeals takes approximately six months to two years or more.

B. Deferral to Arbitration. In *Olin Corp.*, 268 N.L.R.B. 573 (1984), the Board stated that it will defer resolving the unfair labor practice case to arbitration award if: (1) the contractual issue is factually parallel to the unfair labor practice issue; and (2) the arbitrator was presented

generally with the facts relevant to resolve any unfair labor practice. The Board also stated that unless the award was "palpably wrong"; that is, unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, the Board will defer.

C. Remedies. If the charged party ultimately loses, and the case involves back pay, the charged party owes the discriminatee back pay plus interest less interim earnings. The employer may also be ordered to reinstate the discriminatee – even if she or he was merely a casual laborer on a temporary construction project. *Dean General Contractors*, 285 N.L.R.B. No. 72 (1987).

Bargaining Orders. The Board can require an employer to collectively bargain with a labor organization even though no election has been held or in spite of the fact that a union lost an election. A bargaining order may be warranted when the ULPs have a tendency to undermine majority strength and impede the election processes. The Board has stated that "under no circumstances" will it issue such a bargaining order if the union has not, at some point, had majority support. *Gourmet Foods, Inc.*, 270 N.L.R.B. 578 (1984). There is a "running feud" between the appeals courts and the NLRB over changes in the employee complement, such as employee turnover or the passage of time, and how that affects the decision to order bargaining. The Board has consistently deemed such changes irrelevant but, as the Eighth Circuit noted, almost all of the appeals courts have disagreed. *NLRB v. Cell Agricultural Manufacturing Co.*, 41 F.3d 389 (8th Cir. 1994); *J.L.M., Inc. v. NLRB*, 31 F.3d 79 (2d Cir. 1994). *See also NLRB v. U.S.A. Polymer Corp.,* 272 F.3d 289, 293 (5th Cir. 2001) ("The Federal Circuit Courts are almost unanimous in holding that the NLRB must take current conditions into account when it determines whether to issue a bargaining order" under *Gissel*).

X. SUPERVISORS AND MANAGEMENT LABOR ATTORNEYS NOT SUBJECT TO PERSUADER REPORTING REQUIREMENTS

The Landrum-Griffin Act (LMRDA) requires that employers and consultants report any arrangement in which the consultant "undertakes activities where an object thereof is, directly or indirectly . . . to persuade employees . . . or . . . to supply an employer with information concerning the activities of employees or a labor organization." The Act provides an exemption for the "giving or agreement to give advice" and also exempts "expenditures made to any regular officer, supervisor, or employee of an employer as compensation for a service . . . ." *See United Auto Workers v. Dole*, 869 F.2d 616 (D.C. Cir. 1989) (approving the DOL's determination that reporting is not required with regard to "payments to consultants to devise for the employer's use personnel policies to discourage unionization" nor for "antiunion activities engaged in by supervisors for which the supervisors receive no pay beyond their regular salaries." The DOL concluded that a "consultant law firm does not engage in reportable activity under the LMRDA when it devises personnel policies to discourage unionization, so long as the work product, whether written or oral, 'is submitted . . . to the employer for his use, and the employer is free to accept or reject [the submission].'") The court noted that where the attorney consultant had direct contact with employees or engages directly in persuader activity, that contact would not constitute exempt advice. The DOL later revised its interpretation of the advice exemption to require that when a consultant or lawyer prepares or provides a persuasive script, letter, videotape, or other material for use by an employer in communicating with employees, no exemption applies and the duty to report is triggered. However, on April 11, 2001, the DOL rescinded this interpretation and reinstated the prior interpretation of the term "advice" under § 203(c).

XI. APPENDIX

Typical Questions Asked By Employees, *see* http://www.fordharrison.com/sourcebooks.aspx.

Chapter Twenty-Six

COPING WITH UNIONS

Chapter Twenty-Six

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Chapter Twenty-Six

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COPING WITH UNIONS

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I. HOW A UNION GAINS BARGAINING RIGHTS WITH AN EMPLOYER

A. NLRB Representation Elections. NLRB representation elections are the most common manner in which a union gains the right to bargain. Generally speaking, a union will ask employees to sign cards stating that they would like to be represented by the union. The union will then present the cards to the employer, and when, as is usually the case, the employer refuses to voluntarily recognize the union as the exclusive collective bargaining representative of the employees, the union will present the cards to the National Labor Relations Board (NLRB or Board) and demand an election. Unions must present cards for at least thirty percent of the employees for there to be a "showing of interest" significant enough to warrant an election, but they usually aim for a far higher percentage before requesting an election. The Board will then usually order an election for a defined unit of employees. If the union gains a majority of the votes of the employees voting, it has the right to represent the entire defined bargaining unit in collective bargaining.

B. Voluntary Recognition. The employer may also voluntarily recognize the union when the union presents the employer with cards signifying that a majority of the employees would like a union. Failure to adequately ascertain the majority status of the union can cause the employer to be found guilty of unlawfully assisting a union in violation of § 8(a)(2) of the National Labor Relations Act (NLRA or the Act). "If an employer voluntarily recognizes a union based solely on that union's assertion of majority status, without verification, an employer is not free to repudiate the contractual relationship that it has with the union outside the 10(b) period, *i.e.*, beyond the 6 months after initial recognition, on the ground the union did not represent a majority when the employer recognized the union." *Oklahoma Installation Co.*, 325 NLRB 741, 742 (1998), *enf. denied on other grounds*, 219 F.3d 1160 (10th Cir. 2000); *Alpha Associates,* 344 N.L.R.B. No. 95 (2005), *enf'd* 2006 U.S. App. LEXIS 21223 (4th Cir. Aug. 18, 2006).

In *Heartland Indus. Partners,* 2005 WL 1457444, 2005 NLRB LEXIS 271 (N.L.R.B. Div. of Judges, June 16, 2005), Heartland, a private equity firm that invests in industrial manufacturing companies, entered into an agreement with the United Steelworkers of America, which provided that if, at any time following six months after Heartland acquired a company, the union notified Heartland of its intent to organize any of the facilities of the acquired company, Heartland would cause the company to execute an agreement that would, among other things grant recognition to the union based on card check procedures. One of the companies acquired by Heartland challenged this agreement, claiming it violated § 8(e) of the Act (the secondary boycott provision). The ALJ rejected this argument, holding that the agreement did not require Heartland to cease doing business with any other person.

C. Unfair Labor Practices. In limited cases, the Board may remedy an employer's unfair labor practices by ordering the employer to bargain with the union even though an election has not been held or has been held and lost by the union. Generally this remedy will be available where the employer commits serious unfair labor practices that interfere with the selection process and tend to preclude the holding of a fair election. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In *Audubon Reg'l Med. Ctr.*, 331 N.L.R.B. No. 42 (2000), the Board refused to issue a *Gissel* order after the union lost an election, even though the employer hospital was guilty of serious unfair labor practices, because there had been a change of ownership in the hospital that included a 100% turnover in management personnel and because the election was held more than six years

prior. The Board stated that a *Gissel* order would likely be unenforceable in court because of the management change. The Board did, however, issue "special remedies" to ensure a fair election would be held in the future.

D. Successorship. When a unionized employer sells its business, the employer succeeding the unionized employer may have a duty to bargain with the union. *See, e.g., Community Hospitals Of Central California v. NLRB,* 335 F.3d 1079 (D.C. Cir. 2003) (a private, nonprofit company taking over a California public hospital and instituting a new management structure was a successor employer for purposes of the NLRA where the nurses continued to do the same jobs, in the same location, using the same equipment, and treating the same patients and the nature of the business – an acute care facility – did not change); *Midwest Precision Heating & Cooling Inc. v. NLRB,* 408 F.3d 450 (8th Cir. 2005) (successor company that was alter ego of predecessor company violated NLRA by bypassing union and dealing directly with employees over the terms and conditions of their employment).

1. Analytical Framework for Establishing Refusal to Hire in Successorship Context. In *Planned Building Services, Inc.,* 347 N.L.R.B. No. 64 (2006), the Board clarified the legal framework for analyzing whether a successor employer has unlawfully refused to hire its predecessor's employees. In analyzing this issue, the Board held that the ALJ erred in applying the analytical framework set forth in *FES,* 331 NLRB 9 (2000), which generally applies in cases involving a discriminatory failure to hire or refusal to consider for hire. The Board held instead that the appropriate analysis is that set forth in *Wright Line*, 251 NLRB 1083 (1980), *enf'd,* 662 F.2d 899 (1st Cir. 1981).

a. Background. In *Wright Line*, supra, the Board set forth the standard to be applied to unfair labor practice allegations that turn on employer motivation. To establish a violation under *Wright Line*, the General Counsel has the burden to prove that an employer's actions were the result of its animus toward union or protected activity. Once the General Counsel has met this burden, the Board will find a violation unless the employer proves that it would have taken the same action even in the absence of the protected activity.

In *FES*, the Board supplemented the *Wright Line* analysis to be applied in cases where an employer is alleged to have acted with a discriminatory motive in failing to hire an applicant. To establish an unlawful failure to hire under *FES*, in addition to demonstrating the employer's unlawful motivation, the General Counsel must establish that the employer was hiring or had concrete plans to hire at the time of the alleged unlawful conduct and that the applicants had experience or training relevant to the vacant positions. Alternatively, the General Counsel can show that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination. Once the General Counsel has met this burden, the burden shifts to the employer to show that it would not have hired the applicants even in the absence of their union affiliation or protected activity. 331 NLRB at 12. Additionally, in cases involving numerous applicants, the General Counsel must demonstrate the number of available positions when seeking a remedy of instatement and back pay. *Id.* at 13.

b. *Wright Line* Analysis Should Be Used. In *Planned Building Services,* the Board held that the additional requirements established in *FES* are not appropriate in the successorship context because the predecessor's employees presumptively meet the successor's qualifications for hire. Additionally, "because a successor employer must fill vacant positions in starting up its business, it is similarly of little use to require the General Counsel to demonstrate that the employer was hiring or had concrete plans to hire." 347 N.L.R.B. No. 64 (2006). Thus, to establish a violation of Section 8(a)(3) and

(1) in cases where a refusal to hire is alleged in a successorship context, the General Counsel has the burden to prove that the employer failed to hire employees of its predecessor and was motivated by antiunion animus. The following factors can establish that a new owner violated Section 8(a)(3) by refusing to hire the employees of the predecessor:

> [S]ubstantial evidence of union animus; lack of a convincing rationale for refusal to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; and evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force to avoid the Board's successorship doctrine

347 N.L.R.B. No. 64 (2006).

Once the General Counsel has shown that the employer failed to hire employees of its predecessor and was motivated by antiunion animus, the burden then shifts to the employer to prove that it would not have hired the predecessor's employees even in the absence of its unlawful motive. In establishing its *Wright Line* defense, the employer is free to show, for example, that it did not hire particular employees because they were not qualified for the available jobs, and that it would not have hired them for that reason even in the absence of the unlawful considerations. Similarly, the employer is free to show that it had fewer unit jobs than there were unit employees of the predecessor. *Planned Building Services,* 347 N.L.R.B. No. 64 (2006).

2. Stock Purchase. Generally, a purchaser of stock is required to bargain with the union and adopt the existing collective bargaining agreement. *See, e.g., TransMontaigne, Inc.,* 337 N.L.R.B. No. 38 (2001); *Teamsters v. Portland Auto Delivery Co.*, 90 LRRM 2786, 2788 (D.Or. 1975) ("[a] corporation may not avoid its labor contract obligations any more than it may avoid other contractual obligations simply because there has been a sale of assets or stock between two individuals. The corporate entity continues together with the rights, privileges, and obligations accruing thereto.") Thus, if there is no significant change in the organization due to the stock purchase then the obligation to bargain will remain. *See TransMontaigne, Inc.*, 337 N.L.R.B. at *20-21 (where there was simply a transfer of stock that did not involve a substitution of one employer for another, the changes in stock ownership and corporate name did not result in any significant changes to the operation; accordingly, there was no need for a successorship analysis because the purchaser was the same legal entity.)

However, in some stock purchase situations, the Board or court will apply a successorship analysis, which is traditionally applied in asset purchase situations.

3. Asset Purchase. In an asset purchase situation, whether the purchaser is required to bargain with the exclusive representative of the seller's employees depends on whether there is "substantial continuity in the employing enterprise." *See, e.g., Aircraft Magnesium,* 265 N.L.R.B. 1344, 1345 (1982)*, enf'd without op.,* 730 F.2d 767 (9th Cir. 1984)*; Miami Industrial Trucks, Inc.,* 221 N.L.R.B. 1223, 1224 (1975).

In determining whether there is substantial continuity, the Board generally looks at: (a) business operations; (b) plant; (c) workforce; (d) jobs and working conditions; (e) supervisors; (f) machinery, equipment and methods of production; and (g) products or service. *See Aircraft Magnesium,* 265 N.L.R.B. at 1345. Although the issue of successorship is primarily a factual determination based on the totality of the circumstances, courts generally will not find successorship unless the majority of the new employer's bargaining

unit employees were members of the seller's unit work force at or near the time the seller ceased operations. *See Airport Bus Service, Inc.,* 273 N.L.R.B. 561, 562 (1984) (citations omitted)*, disavowed on other grounds in St. Mary's Foundry Co.,* 284 N.L.R.B. 221 fn. 4 (1987); *accord, Royal Vending Services, Ltd.,* 275 N.L.R.B. 1222, 1226-27 (1985). Without a "majority" the Board generally will find no successorship, regardless of the presence of other indicia. *See, e.g., G.W. Hunt,* 258 N.L.R.B. 1198, 1201 (1981).

4. Successor Bar. While an asset purchaser must recognize and bargain with the seller's union where the seller's unionized employees comprise a majority of the purchaser's workforce in an appropriate bargaining unit, it typically is not required to assume the seller's collective bargaining agreement. *See NLRB v. Burns Int'l Security Services*, 406 U.S. 272 (1972). Thus, in an asset purchase, there often is not a contract in place that prevents challenges to a union's continuing status as the desired representative of a majority of the employees. Before the NLRB's decision in *MV Transportation*, 337 N.L.R.B. No. 129 (2002), a company that purchased the assets of a unionized employer found itself in a difficult situation. Such a purchaser had to recognize and bargain with the seller's union for a "reasonable period" of time, even though it might have suspected or even known that most of its employees wanted the union gone. *See St. Elizabeth Manor Inc*., 329 N.L.R.B. No. 36 (1999). Under the NLRB's "successor bar" rule, employers acted at their peril by challenging whether such a union continued to enjoy majority support because the "reasonable period" standard was so imprecise.

The Board's decision in *MV Transportation* overturned *St. Elizabeth's Manor* and removed the uncertainty of the successor bar rule for a purchasing employer. In *MV Transportation,* the Board returned to the position it held prior to the *St. Elizabeth Manor* decision and held that an incumbent union in a successor employer situation is entitled only to a rebuttable presumption of continuing majority status, which will not operate to bar an otherwise valid decertification, rival union, or employer petition. *MV Transportation,* 337 N.L.R.B. at 773. In light of this reversal, employees of an acquired business are free to seek to decertify their union at any time after an acquisition, as long as the union has been their certified bargaining representative for more than one year and there is no collective bargaining agreement in effect.

E. Accretion. An accretion occurs when new employees, or present employees in new jobs, perceived to share a sufficient community of interest with existing unit employees, are added to an existing bargaining unit without being afforded an opportunity to vote in a union election. *See NLRB v. Superior Protection, Inc.,* 401 F.3d 282 (5th Cir. 2005), *cert. denied,* 126 S. Ct. 244 (2005). The most common circumstances giving rise to a claim of accretion involve an employer with a preexisting bargaining unit that acquires an additional facility where the new employees' interests align with existing unit employees, and the union attempts to add the new employees to the existing bargaining unit without an election. *Id.* at n.5.

In *Bryan Infants Wear Company*, 235 N.L.R.B. 1305, 1306 (1978), the Board found the following factors relevant in determining whether an accretion has occurred: "the bargaining history; the functional integration of operations; the differences in the types of work and the skills of employees; the extent of centralization of management and supervision, particularly in regard to labor relations, hiring, discipline, and control of day-to-day operations; and the extent of interchange and contact between the groups of employees." *See also Judge & Dolph, Ltd*., 333 N.L.R.B. No. 19 (2001) (Geographic separation is a factor top be considered in addition to the aforementioned); *Safeway Stores, Inc*., 276 N.L.R.B. 944 (1985); *Pix Manufacturing Co*., 181 N.L.R.B. 88, 91 (1970).

"Essentially, the [accretion] doctrine is designed to preserve industrial stability by allowing adjustments in bargaining units to conform to new industrial conditions without requiring an

adversary election every time new jobs are created or other alterations in industrial routine are made." *NLRB v. Stevens Ford, Inc*., 773 F.2d 468, 473 (2d Cir.1985). In *Superior Protection,* the court noted that regardless of the benefits to industrial stability, because accreted employees are absorbed into an existing collective bargaining unit without an election and are governed by the preexisting unit's choice of bargaining representative, the accretion doctrine sits in substantial tension with the guarantee of employee self-determination reflected in § 7 of the NLRA, which guarantees, among other things, employees' right to self organization and to bargaining collectively through representatives of their own choosing and the right to refrain from doing so. 401 F.3d at 287.

Recognizing this conflict, the Board's jurisprudence "has historically favored employee elections, reserving accretion orders for those rare cases in which it could conclude with great certainty, based on the circumstances, that the employees' rights of self-determination would not be thwarted." *Id.* at 288 (citing *Baltimore Sun,* 257 F.3d at 427). Accordingly, the Board will accrete employees to an existing unit without an election "only when the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted." *Id.* (citing *Safeway Stores, Inc*., 256 N.L.R.B. 918, (1981) (footnotes omitted)). *See also Pan Am. Grain Co*., 317 N.L.R.B. 442, 447, (" 'In furtherance of the statutory duty to protect employees' right to select their bargaining representative, the Board follows a restrictive policy in finding accretion.' ") (quoting *United Parcel Serv.,* 303 N.L.R.B. 326, 327, (1991), *enf'd* 17 F.3d 1518 (1994)).

In furtherance of the NLRA's policy of employee self-determination, doubts as to whether new employees share the requisite overwhelming community of interest with the existing unit are to be resolved through the election process. *Superior Protection,* 401 F.3d at 288 (citations omitted). Additionally, the Board will not permit an accretion if the size of the group to be accreted overshadows the number of employees in the existing unit. *Id.* at 288-89 (citations omitted). *See also Frontier Telephone of Rochester, Inc.,* 344 N.L.R.B. No. 153 (2005) (the Board will permit accretion only when "employees sought to be added to an existing bargaining unit have little or no separate identity and share an overwhelming community of interest with the preexisting unit to which they are accreted"; finding accretion of Internet help technicians to bargaining unit of customer service workers violated § 8(a)(2) and that the enforcement of the union security clause as to the Internet help technicians by deducting union dues from their pay violated § 8(a)(3)), *enf'd,* 2006 U.S. App. LEXIS 12443 (2d Cir. May 16, 2006).

II. THE COLLECTIVE BARGAINING PROCESS AFTER THE BARGAINING OBLIGATION ATTACHES

A. Duty to Bargain in Good Faith.

1. Section 8(d) Definition of Bargaining. Section 8(d) of the Act requires an employer and a union to meet at reasonable times and to confer in good faith with respect to wages, hours, and other terms and conditions of employment in an effort to reach an agreement. Neither party is required to agree to a proposal or make a concession. Additionally, the parties must meet at reasonable times.

Under § 8(a)(5) of the Act, it is an unfair labor practice for an employer to refuse to bargain with the exclusive bargaining representative of its employees, 29 U.S.C. § 158(a)(5). A violation of § 8(a)(5) constitutes a derivative violation of § 8(a)(1). *See Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004). Section 8(b)(3) prohibits a collective bargaining representative from refusing to engage in collective bargaining when the union represents an employer's employees. The same bargaining considerations apply to unions as

apply to employers pursuant to § 8(a)(5) of Act. A union cannot force members of multi-employer bargaining unit to bargain individually. *United Slate, Tile & Composition Roofers, Damp & Waterproof Workers Association, Local No. 220*, 177 N.L.R.B. 632 (1969).

The duty to bargain is mandatory with respect to the subjects listed in § 8(d) of the Act, 29 U.S.C. § 158(d), *i.e*., wages, hours, and terms and conditions of employment. *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). Subjects that are "plainly germane to the 'working environment' " and are "not among those 'managerial decisions, which lie at the core of entrepreneurial control' " are deemed "terms and conditions of employment" and therefore are mandatory subjects of bargaining. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498, (1979) (quoting *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 222, 223, (1964) (Stewart, J., concurring)). Thus, an employer's unilateral change in a term or condition of employment without first bargaining to impasse violates §§ 8(a)(5) and (1). *See Litton*, 501 U.S. at 198; *Beverly Health & Rehab. Svs., Inc. v. NLRB*, 317 F.3d 316, 322 (D.C. Cir. 2003).

Definitions of "Good Faith". The parties must enter into collective bargaining with an open mind and a sincere desire to reach an agreement; the parties must make every reasonable effort to reach an agreement, *Houde Eng'g Corp*., 1 N.L.R.B. (Old) 35, 44 (1934); and the parties must bargain with a bona fide intent to reach an agreement, *Atlas Mills, Inc*., 3 N.L.R.B. 10, 21 (1937).

2. Duration of the "Duty to Bargain." The obligation to bargain in good faith extends to a union the Board certifies as the exclusive bargaining representative and when the employer voluntarily recognizes a union that represents a majority of unit employees.

There is a one-year presumption (absent unusual circumstances) that a certified union is the majority representative of the unit's employees. *Brooks v. NLRB*, 348 U.S. 96 (1954). After an initial refusal to bargain, the certification year begins when good faith bargaining begins. *See Van Dorn Plastic Mach. Co. v. NLRB*, 939 F.2d 402 (6th Cir. 1991). Loss of majority status within the certification year is, in all likelihood, no defense. *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944). After the certification year, which can be extended because of employer unfair labor practices, the union's majority status can be challenged. *Celanese Corp. of Am. (Bishop, Tex.)*, 95 N.L.R.B. 664 (1951), *overruled in part by Levitz Furn. Co. of the Pacific, Inc.,* 333 N.L.R.B. No. 105 (N.L.R.B. Mar. 29, 2001).

In *Nova Plumbing v. NLRB,* 330 F.3d 531 (D.C. Cir. 2003), the D.C. Circuit Court of Appeals overturned an NLRB decision finding that a contract between a construction employer and a union was not governed by § 8(f) of the Act, but instead was governed by § 9(a). Under § 8(f), a construction industry employer may refuse to bargain with a union after the expiration of a "pre-hire" agreement, while under § 9(a), an employer must continue bargaining after a collective bargaining agreement expires. The court held that because the Board relied solely on a contract provision suggesting the company and union intended a § 9(a) relationship despite strong record evidence that the union may not have enjoyed majority support as required by § 9(a), it failed to protect the employees' § 7 rights to "bargain collectively through representatives of their own choosing."

3. Examples of "Bad Faith" Bargaining Tactics. Examples of conduct considered "*per se*" violations: a blanket refusal to meet; a refusal to execute a written contract embodying the terms agreed upon; refusal to turn over relevant information; unilateral changes in mandatory subjects under negotiation before reaching impasse (see discussion below); and insistence to impasse on a nonmandatory subject of bargaining. Avoiding "overall" bad faith bargaining is much more difficult.

4. Surface Bargaining.

a. Surface Bargaining Defined. If it appears that the employer is merely going through the motions of bargaining but has no intention of reaching a collective bargaining agreement, the employer may be found guilty of surface bargaining.

b. Evidence of Surface Bargaining. The refusal to make concessions or the making of proposals to which "no self-respecting union could agree" has been determined to constitute evidence, in certain cases, of surface bargaining. Generally, however, bad faith will not be found when such proposals are merely opening proposals and are later withdrawn. *Hondo Drilling Co., N.S.L.*, 213 N.L.R.B. 229 (1974), *enf'd*, 525 F.2d 864 (1974); *Orion Tool, Die & Machine Co*., 195 N.L.R.B. 1080, 864 (1972). Dilatory tactics may constitute evidence of surface bargaining, *Lloyd A. Fry Roofing Co. v. NLRB*, 216 F.2d 273 (9th Cir. 1954), *opinion modified,* 220 F.2d 432 (9th Cir. 1955), as may arbitrary scheduling of meetings, revocation of prior agreements, and making new proposals well into negotiations. In, the Board held that the employer did not engage in surface bargaining where eviden

c. Hard Bargaining Distinguished from Surface Bargaining. In avoiding an "overall bad faith" finding where the employer maintains a "hard" bargaining position, it is critical that the employer demonstrate sound business reasons for its positions. For example, in *Cincinnati Newspaper Guild, Local 9 v. NLRB*, 938 F.2d 284 (D.C. Cir. 1991), an employer's insistence on controlling wage increases was not bad faith bargaining. *See also Garden Ridge Management, Inc.,* 347 N.L.R.B. No. 13 (2006) (employer did not engage in surface bargaining by submitting a proposal that the union refrain from organizing certain non-bargaining-unit employees and a broad management rights proposal, which it subsequently modified; the employer's effort to "secure agreement, where possible, while voicing its intent not to retreat from the substance of its bargaining position, is not inconsistent with an intent to reach an agreement"). In *Garden Ridge,* the Board noted that although the employer's refusal to meet more frequently for negotiating sessions violated its obligation to "meet at reasonable times," the fact that a party does not meet with sufficient frequency does not necessarily mean that it does not wish to agree to a contract.

5. Boulwarism. An employer that carefully researched and formulated a single offer anticipating the union's demands was found to violate the duty to bargain in good faith. The Board also found that the employer's mass communication campaign selling its proposal directly to the employees contributed to a finding of bad faith. *General Electric Co. (New York, N.Y.)*, 150 N.L.R.B. 192 (1964), *enf'd*, 418 F.2d 736 (2d Cir. 1969). Communications to employees during negotiations may be critical, however. The Board has reaffirmed the employer's right to communicate directly with its employees provided the union is not bypassed. *United Technologies Corp*., 274 N.L.R.B. 609 (1985), *enf'd*, 789 F.2d 121 (2d Cir. 1986).

6. Duty to Provide Information to the Union. Generally, an employer violates its duty to bargain in good faith when it refuses to provide to the union information "relevant" to the union's representation of the employees in the bargaining unit.

7. Refusal to Bargain During Non-Working Hours or Permit Employees to Take Unpaid Leave. The Board has held that an employer's refusal to bargain during non-working hours and its requirement that employee members of the bargaining committee use their paid time off to attend bargaining sessions during work hours violated the NLRA. *See Ceridian Corporation,* 343 N.L.R.B. No. 70 (2004). The Board held that the employer could either permit the employees to use unpaid leave to attend the bargaining sessions or could

schedule them during non-working hours, but could not penalize employee members of the bargaining committee by requiring them to use their paid time off to attend sessions.

8. No Changes In "Mandatory Subjects" of Bargaining Until Agreement, Impasse, or Waiver. A unilateral change is a *per se* violation of § 8(a)(5). *NLRB v. Katz*, 369 U.S. 736 (1962).

Exceptions to the Per Se Test.

a. Upon Reaching Bona Fide Impasse. *American Laundry Machinery Co. (Cincinnati, Ohio)*, 107 N.L.R.B. 1574 (1954). Changes in mandatory subjects of bargaining before impasse may support an inference of a lack of good faith. *NLRB v. Fitzgerald Mills Corp*., 313 F.2d 260 (2d Cir. 1963).

b. Waiver of Bargaining Rights. A waiver of bargaining rights evidenced by "clear and unmistakable language" gives employers the right to take certain action without having to negotiate with the union. *United States Lingerie Corp*., 170 N.L.R.B. 750 (1968). A waiver of bargaining rights may occur when the employer gives notice to the union of a proposed change and the union then fails to request bargaining. *YHA, Inc. v. NLRB*, 2 F.3d 168 (6th Cir. 1993) (union's failure to request bargaining, after being formally and fully apprised of employer's intent to completely eliminate smoking, until last business day before new policy was to take effect, found to be waiver of obligation to bargain).

In *Teamsters Local Union No. 71*, 331 N.L.R.B. No. 18 (2000), the Board held that a collective bargaining agreement did not contain a "clear and unmistakable waiver" of the employer's duty to bargain over a decision to layoff employees and that the layoff of the most junior employee violated § 8(a)(5). The Board reached this decision even though the CBA specifically stated that in a reduction in force, the most junior employee(s) would be laid off first and that any employee being laid off due to slack business would be laid off at 2400 hours on Friday and would be given written notice with a copy to the union. The Board held that this contract provision merely provided for the succession of layoffs and the manner in which layoffs would be implemented. According to the Board, these issues were separate from the issue of whether the employer would resort to layoffs in the face of economic problems; the employer was required to bargain with the union over that subject.

In *Allison Corp*., 330 N.L.R.B. No. 190 (2000), the Board held that the employer had no duty to bargain over the decision to subcontract work, where the management rights clause in the contract specifically stated that the employer had "the exclusive right to . . . subcontract." The Board held that this clause was a clear and unmistakable waiver by the union of its right to bargain over the issue of subcontracting. The Board also held, however, that the employer violated § 8(a)(5) by failing to bargain over the effects of subcontracting.

c. Notice and Opportunity to Bargain. The Fifth Circuit recognizes an exception when the employer has afforded the union notice and an opportunity to bargain, even if impasse has not been reached. *Nabors Trailers v. NLRB*, 910 F.2d 268 (5th Cir. 1990); *NLRB v. Citizens Hotel Co*., 326 F.2d 501 (5th Cir. 1964).

For a unilateral change to be unlawful, it must involve "wages, hours, terms or conditions of employment." In *Mt. Sinai Hosp*., 331 N.L.R.B. No. 111 (2000), *enf'd,* 8 Fed. Appx. 111, 2001 WL 533552, 2001 U.S. App. LEXIS 10463 (2d Cir. May 17, 2001), the unilateral decision to reclassify employees from sous chef to assistant culinary manager violated § 8(a)(5), according to the Board. Two Board members, Truesdale and Fox, found that this was an unlawful unilateral change in the scope of the unit, because the

sous chef position had been removed from the unit. Member Hurtgen found a violation because the change was a unilateral transfer of unit work.

B. Subjects for Collective Bargaining. The three types of bargaining subjects are classified as mandatory, permissive, or illegal.

1. "Mandatory" Subjects of Bargaining. The distinction between mandatory and permissive subjects was first described by the U.S. Supreme Court in *NLRB v. Wooster Div. of Borg-Warner Corp*., 356 U.S. 342 (1958). Both parties have a statutory obligation to bargain only with respect to "mandatory" subjects; that is, wages, hours, and other terms and conditions of employment. *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), *aff'd*, 339 U.S. 382 (1950). *See also Verizon New York Inc. v. NLRB,* 360 F.3d 206 (D.C. Cir. 2004) (employer's decision to terminate a policy allowing employees to participate in blood drives on company time was a mandatory subject under CBA; employees received full pay and time credits for periods in which they donated blood and the employer's decision to stop permitting blood donations during company time implicitly affected the wage and hour conditions of employees). Parties may only bargain to impasse concerning mandatory subjects of bargaining. Some examples of "mandatory" subjects are:

a. Pensions and welfare plans;

b. Profit-sharing plans;

c. Piece rates, incentive pay, and overtime pay;

d. Holidays, vacations, sick leave;

e. Hours of work, clean-up time, breaks, and shift differential;

f. Insurance benefits for current employees;

g. Severance pay;

h. Seniority and promotions;

i. Grievance and arbitration procedure;

j. No-strike clause;

k. Plant rules;

- Drug Testing. In *Johnson-Bateman Co.,* 295 N.L.R.B. 180 (1989), the Board held that drug testing all current employees involved in on-the-job injuries was a mandatory subject of bargaining and that the employer's general management rights clause did not evidence a waiver of the union's right to bargain over this subject. A pre-employment testing policy requiring that all applicants pass a drug test to be eligible for employment is not a mandatory subject of bargaining, however, and employers are free to unilaterally implement such policies without bargaining with the union. *Star Tribune, Div. of Cowles Media Co.,* 295 N.L.R.B. 543 (1989). In *Lid Elec. Inc. v International Bhd. of Elec. Workers Local 134,* 362 F.3d 940 (7th Cir. 2004) the court held that the employer was bound to a drug testing agreement between it and the union, even though the agreement required testing of non-union employees. The court held that the rights of non-union employees were not in jeopardy because the agreement did not place any obligations on them. Only the employer had an obligation under the agreement – to administer the drug tests.
- Smoking. In *W-I Forest Prods. Co*., 304 N.L.R.B. 957 (1991), the Board explicitly held that a ban on smoking on an employer's premises during working hours is a mandatory subject of bargaining, regardless of whether the union seeks

to obtain such a ban or to limit or eliminate such a ban. Moreover, a union's alleged waiver of its right to bargain over a smoking policy must be "clear and unmistakable."

- Installation of surveillance cameras. In *Anheuser-Busch Inc*., 342 N.L.R.B. No. 49 (2004), a 2-1 panel of the Board held that the employer violated §§ 8(a)(5) and (1) by failing to give notice to and bargain with the union before installing and using hidden surveillance cameras in the workplace. The Board held that the use of hidden surveillance cameras in the workplace is a mandatory subject of bargaining. *Id.* Thus, by unilaterally installing hidden cameras in the employees' work and break areas, the employer violated § 8(a)(5). The D.C. Circuit upheld this decision, but remanded the case to the Board to determine the appropriate remedial order for the employees who were disciplined as a result of misconduct discovered by the use of the hidden cameras. *Brewers and Maltsters v. NLRB*, 414 F.3d 36 (D.C. Cir. 2005).

l. Duration of agreement; and

m. Management rights clause.

2. "Permissive" Subjects of Bargaining. Subjects that fall outside the realm of the phrase "wages, hours and other terms and conditions of employment" are generally considered permissive subjects of bargaining. Insistence to impasse on inclusion of a permissive subject of bargaining in a collective bargaining agreement is a violation of § 8(a)(5) or 8(b)(3). *Steere Broadcasting Corp*., 158 N.L.R.B. 487 (1966). "Permissive" subjects include:

a. Definition of the bargaining unit. In *Antelope Valley Press*, 311 N.L.R.B. 459 (1993), and *Bremerton Sun Publishing Co*., 311 N.L.R.B. 467 (1993), the Board held that when the bargaining unit description is couched in terms of work performed, the employer, after reaching impasse, may insist on transferring work of a type covered by the description to employees other than those currently performing the work. The employer may not, however, change the unit description or insist that nonunit employees to whom the work is transferred will remain outside the bargaining unit. The Board, either in an unfair labor practice proceeding or in a unit clarification proceeding, may then determine whether such employees fall within the unit;

b. Internal union affairs (including union agreement to require ratification of contract by employees);

c. Industry promotion funds;

d. Settlement of lawsuits;

e. Provisions for tape-recording collective bargaining sessions and grievance meetings. *Hutchinson Fruit Co*., 277 N.L.R.B. 497 (1985);

f. Interest arbitration. Interest arbitration is a form of arbitration used as part of, or in lieu of, the actual collective bargaining process. The typical format entails the submission of unresolved issues to a neutral arbitrator who decides between the proposals of the employer and the union;

g. Entrepreneurial decisions. In *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), the U.S. Supreme Court held that an employer's purely economic decision to close a part of its business is not a mandatory subject, although the employer must bargain over the "effects" of the decision. The Board has since held that even if labor costs are admittedly a factor in a decision to relocate, there is no obligation to bargain where the decision does not "turn on" labor costs. *Columbia City Freight Lines, Inc*., 271

N.L.R.B. 12 (1984); *Bostrom Div., UOP, Inc*., 272 N.L.R.B. 999 (1984). However, in *Dubuque Packing Co*., 303 N.L.R.B. 386 (1991), *enf'd*, 1 F.3d 24 (D.C. Cir. 1993), the Board set forth a new test for determining when bargaining over plant relocations is required. Under the new test, the Board's General Counsel has the initial burden of establishing that the relocation decision is not accompanied by a basic change in the nature of the employer's operation. If the General Counsel meets that burden, a *prima facie* case for bargaining has been established. To avoid bargaining, an employer must establish that: (1) the work at the new location varies significantly from the work at the old location; (2) the work performed at the old location will be completely discontinued; or (3) the relocation decision is part of a change in the scope of the employer's enterprise. The employer may also avoid bargaining by showing that labor costs are not a factor in the decision, or that even if they are a factor, the union cannot offer labor cost concessions that will change the management decision.

In *Komatsu America Corp*., 342 N.L.R.B. No. 62 (July 30, 2004), a three-member panel of the Board affirmed an ALJ's dismissal of a failure to bargain claim that was based on the employer's implementation of a reduction in force while the employer and union were in the midst of effects bargaining. In this case, the employer announced an outsourcing initiative that involved transferring some of its assembly operations to Japan. Effects bargaining ensued at the request of the union and during the process of this bargaining the company imposed a reduction in force. The NLRB General Counsel claimed that this reduction in force presented the union with a *fait accompli*, which precluded meaningful effects bargaining thereafter. The Board held that the General Counsel failed to show a causal nexus between the outsourcing initiative and the reduction in force. The reduction in force adversely affected the entire workforce, not just the machine shop from which work was being outsourced, and was caused by a general downturn in business. In fact, the employee complement in the machine shop, as a percentage of the total workforce, actually increased after the layoffs. The Board also held that the employer did not violate § 8(a)(1) by instructing employees not to wear a t-shirt protesting the outsourcing, which compared the outsourcing to the attack on Pearl Harbor (the employer is a Japanese-owned company). The Board held, "[p]articularly in light of the Union's clear appeal to ethnic prejudices, we find that the T-shirt was sufficiently offensive and provocative to justify its regulation by the Respondent."

h. A provision allowing management the right to offer retirement incentives to individual employees. *Toledo Typographical Union No. 63 v. NLRB*, 907 F.2d 1220 (D.C. Cir. 1990).

i. Provisions prohibiting employees and their union from interfering with the employer's ability to maintain funding. *Mental Health Services, Northwest, Inc*., 300 N.L.R.B. 926 (1990).

j. A provision banning dual shop operations by a construction industry employer, *i.e*., a clause that provides that if the employer or its owners form another business enterprise performing work within the union's jurisdiction, that business enterprise should be manned in accordance with referral provisions found in the collective bargaining agreement and be covered by all the terms of the agreement. *Northeast Ohio Dist. Council of the United Bhd. Of Carpenters & Joiners*, 310 N.L.R.B. 1023 (1993).

3. Examples of "Illegal" Subjects of Bargaining. Illegal subjects cannot be properly included in a labor agreement and should not be proposed. Illegal subjects include:

a. Hot cargo clauses;

b. Closed shop clauses;

c. Union security clauses in right-to-work states;

d. Provisions unduly encouraging or discouraging union membership or status. *Radio & Television Broadcast Engineers Union, Local 1212*, 288 N.L.R.B. No. 49 (1988);

e. Language prohibiting employees from engaging in "misrepresentation in connection with any employee benefit" and "misrepresentation of any material fact in connection with any claim concerning . . . employment or . . . pay" was found unlawfully overbroad. *Universal Fuels, Inc.*, 298 N.L.R.B. No. 31 (1990); and

f. Negotiating for pensions for otherwise ineligible union officials in return for concessions. In *United States v. Phillips*, 19 F.3d 1565 (11th Cir. 1994), the Eleventh Circuit affirmed the conviction of the employer and union officials for entering into a "kick back scheme" whereby the employer granted pension benefits to employees who would not otherwise be eligible for benefits in exchange for other concessions by the union. The employer was fined $4.1 million and ordered to pay $289,995 to its pension fund while the two union officials were sentenced to jail.

4. Plant Closings and Removals. In some situations, management has a right to make a decision or take an action without bargaining with the union but must bargain over the "impact" or "effects" of its decision on bargaining unit employees. *See Cyclone Fence, Inc.*, 330 N.L.R.B. No. 186 (2000) (an employer's failure to bargain with the union over the effects of the decision to terminate its operations, which was caused by its creditor's abrupt withdrawal of funds, violated § 8(a)(5); the Board ordered the company to bargain with the union concerning the effects of the closure).

C. Employer Defenses to Union Charges of Bad Faith Bargaining.

1. Not a mandatory subject for bargaining;

2. Bona fide impasse;

3. Union waived right to bargain; and

4. Necessity. The Board rarely permits employers to refuse to bargain and use necessity as an affirmative defense. *See Proctor Express Inc.*, 135 F.3d 766 (1997).

D. Impasse.

1. Legal Implications of Impasse on a Unilateral Change. The requirement of reaching impasse is a severe limitation on an employer's ability to unilaterally change "wages, hours, and other terms and conditions of employment." During the collective bargaining process, employers are precluded from making changes in these employment terms without first bargaining to a good faith impasse with the union representing its employees. The usual remedy for implementing terms before impasse is a bargaining order. A bargaining order is a mandate that the employer maintain the status quo in the employment relationship as it existed before the changes and that employees be made whole for any loss resulting from the unilateral change. *Beacon Journal Publishing Co. v. NLRB*, 401 F.2d 366 (6th Cir. 1968). An employer may implement all or some of its proposals about which it has reached impasse, but generally may not implement more or less favorable terms than have been offered to the union in bargaining. *Buck Creek Coal, Inc.*, 310 N.L.R.B. No. 214 (1993).

2. Common Definitions of Impasse.

a. That point at which, despite the best efforts of the parties to achieve an agreement, neither party is willing to move from its respective position. *Dust-Tex Service, Inc.*, 214 N.L.R.B. No. 60 (1974), *enf'd*, 521 F.2d 1404 (8th Cir. 1975);

b. When the parties have exhausted all avenues for reaching agreement and there is "no realistic possibility that continuation of discussion at that time would have been fruitful." *American Federation of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968); or

c. When the parties have reached that point in negotiations when the parties are warranted in assuming further bargaining would be futile. Furthermore, a party's declaration that an impasse has occurred will not be dispositive in determining whether one does indeed exist. All of the circumstances of the case must be analyzed. *Patrick & Co.*, 248 N.L.R.B. No. 61 (1980), *enf'd*, 644 F.2d 889 (9th Cir. 1981). *See also Coastal Cargo Co., Inc.*, 348 N.L.R.B. No. 32 (2006) (adopting ALJ's determination that the parties had not reached impasse; relying particularly on the fact that the parties did not have adequate opportunity to bargain because, while they agreed to discuss the economic proposals at future meetings, the employer presented its final offer before they had an opportunity to do so. *See Ead Motors Eastern Air Devices*, 346 NLRB No. 93, slip op. at 4-5 (2006). The Board also relied on the fact that the employer demonstrated that further movement was possible by presenting the union with multiple final offers after indicating that it had reached a point where it could not bargain further. *See Duane Reade, Inc.*, 342 NLRB 1016, 1017 (2004)).

An employer may choose to implement some or all of its proposals regarding the impasse to attempt to avoid a strike or to limit the number of employees who choose to strike. It may, however, be beneficial to implement proposals upon which impasse has been reached only after employees have been on strike for a while. This may induce employees to return to work or induce the union to return to the bargaining table with a good faith desire to reach an agreement.

3. Are You at Impasse? In *Taft Broadcasting Co., WDAF, AM-FM TV*, 163 N.L.R.B. 475 (1967), the Board set forth several relevant factors to be considered in deciding whether an impasse in bargaining exists:

a. bargaining history;

b. the good faith of the parties in negotiations;

c. the length of the negotiations;

d. the importance of the issue or issues as to which there is no agreement;

e. the contemporaneous understanding of the parties as to the state of the negotiations; and

f. other factors the Board considers when determining the presence/absence of impasse:

- Whether there is a strike or whether the union has consulted employees about a strike. Note that, without more, a strike does not signify impasse and may break an impasse. *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176 (5th Cir. 1982).
- The fluidity of positions taken by the parties. *J. Josephson, Inc.*, 287 N.L.R.B. 1188 (1988).
- Number of and length of each bargaining session. *Sierra Pub. Co.*, 291 N.L.R.B. 552 (1988), *enf'd*, 888 F.2d 1394 (9th Cir. 1989).
- Whether the employer has demonstrated past or present union animus. *D.C. Liquor Wholesalers Ass'n,* 292 N.L.R.B. No. 132 (1989), *enf'd*, 924 F.2d 1078 (D.C. Cir. 1991).

- Whether the parties continued to bargain after impasse was declared by employer. *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176 (5th Cir. 1982).
- Other actions inconsistent with impasse such as an employer's statement that it would consider counterproposals. *Valley Mould Div., Microdot, Inc.*, 288 N.L.R.B. 1015 (1988).

E. Employer's Duty to Provide Information. For the bargaining process to function properly, there must be exchange of essential information. *NLRB v. Jarm Enters.*, 785 F.2d 195 (7th Cir. 1986). Therefore, the Board holds that it is necessary to the proper discharge of the duties of a bargaining agent that unions gain access to relevant information. *NLRB v. Whitin Machine Works*, 217 F.2d 593 (4th Cir. 1954). Not only may an employer's refusal to supply relevant information give rise to an independent violation of the duty to bargain, it may also preclude a finding of a good faith impasse in negotiations. *Sioux City Stockyards Div.*, 293 N.L.R.B. 1 (1989), *enf'd*, 901 F.2d 669 (8th Cir. 1990). Unions must also provide relevant information to employers for the purpose of collective bargaining. *Detroit Newspaper Printing & Graphic Communications Union*, 598 F.2d 267 (D.C. Cir. 1979).

1. When Duty Attaches. An employer has an obligation to furnish to its employees' union, upon that union's request, sufficient information to enable the union to fulfill its role as a collective bargaining representative. This duty arises as soon as the union is elected the bargaining representative. *Sundstrand Heat Transfer v. NLRB*, 538 F.2d 1257 (7th Cir. 1976). The duty does not attach when the union's request is made in bad faith and/or to harass the employer.

2. Requirements for Information Requested.

a. Necessity of Good Faith Demand. A good faith demand or request by the union is a prerequisite to an employer's obligation to supply information. *Westinghouse Electric Supply Co. v. NLRB*, 196 F.2d 1012 (3d Cir. 1952).

b. Relevance and Reasonably Necessary Information. The information demanded must be relevant and "reasonably necessary" for the performance of the union's function as representative of the employees. *J.I. Case Co. v. NLRB*, 253 F.2d 149 (7th Cir. 1958). In *Fleming Cos.,* 332 N.L.R.B. No. 99 (2000), the Board held that the employer violated §§ 8(a)(1) and (5) by refusing to provide a complete copy of the grievant's personnel file, copies of work rules applicable at the time of the grievant's discharge, and a list of names, addresses, and telephone numbers of all bargaining unit members employed at the relevant time. The Board held that this information was "intrinsic to the core of the employer-employee relationship."

3. Examples of Relevant and Reasonably Necessary Information.

a. Wage data;

b. Wage information concerning employees outside the bargaining unit;

c. Insurance and pension plan information;

d. Time study and incentive plan information;

e. Seniority information;

f. A request to have the union's Safety and Health Specialist inspect the employer's facility – *Klein Tools, Inc.*, 1994 N.L.R.B. LEXIS 767 (1994);

g. An environmental audit – *Detroit Newspaper Agency*, 317 N.L.R.B. 1071 (1995);

h. Customer complaints – *Resorts Int'l Hotel Casino v. NLRB*, 996 F.2d 1553 (3d Cir. 1993) (The Board found that employer must disclose identity and contact information for

customers who complained of poor service unless the employer can show either that the customer requested or the employer promised confidentiality);

i. Medicaid cost reports – *New Surfside Nursing Home*, 330 N.L.R.B. No. 161 (2000);

j. Extent of use of contractors – *West Penn Power Co.,*394 F.3d 233 (4th Cir. 2005) (finding the extent of use of contractors was relevant to the union's attempt to police the company's compliance with specific provisions of CBA and that the company failed to make reasonable efforts to obtain information from contractors regarding the number of contract employees used).

4. Employer Defenses to the Duty to Provide Information.

a. Difference Between Employer Claim of "Inability to Pay" vs. "Unwillingness to Pay." A claim of inability to pay ("claiming poverty") requires that the company open its books to examination by the union. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). The duty to furnish information is triggered only when an employer claims it cannot currently meet bargaining demands or cannot satisfy those demands during the term of the contract being negotiated. *Concrete Pipe & Prods. Corp.-Syracuse Div.*, 305 N.L.R.B. 152 (1991), *aff'd*, 983 F.2d 240 (D.C. Cir. 1993). Furthermore, the duty to provide information does not attach when, instead of claiming poverty, the employer claims that its reason for refusing to make concessions is a competitive disadvantage in the market in which it operates. *Nielsen Lithographing Co.*, 305 N.L.R.B. 697 (1991).

In *Lakeland Bus Lines, Inc. v. NLRB,* 347 F.3d 955 (D.C. Cir. 2003), the D.C. Circuit overturned a Board decision that the company's president had implicitly asserted an inability to pay during union negotiations and that the company had, therefore, violated the NLRA by refusing to turn over its financial records and by unilaterally implementing its final offer in the absence of a valid impasse. In overturning the Board's decision, the court held that a letter sent to employees during contract negotiations laying out the company's bargaining position "to bring the bottom line back into the black" did not mean that the company based its bargaining position on an inability to pay. The court stated held that "[e]ven when an employers' statements suggest an inability to pay, no duty to disclose arises if that employer clarifies that it did not intend to plead financial inability."

In *AMF Trucking & Warehousing,* 342 N.R.R.B. No. 116 (2004), the Board held that the employer's comments during contract negotiations that it had purchased the company in distress and that the company was still in distress and that it was fighting to keep the business alive were not synonymous with as assertion that the employer has or will have insufficient assets to pay. Accordingly, the employer did not unlawfully refuse to supply financial information to the union.

b. Confidentiality. Employers that attempt to defend on the grounds of confidentiality have attained limited success.

(1) Preserving the Investigatory Process. In *United States Postal Serv.*, 306 N.L.R.B. 474 (1992), the Board held lawful the employer's refusal to supply names of internal informants and audio/video recordings of employees suspended for drug-related offenses. The factor weighing in favor of the employer was the interest in maintaining confidential identity of the informants and the integrity of future investigations. In *Fleming Cos.*, 332 N.L.R.B. No. 99 (2000), the Board reiterated that an employer is not required to provide witness statements to the union.

(2) Bargaining Over Confidentiality. The Board takes the position that an employer is entitled to bargain with a union to resolve confidentiality concerns. If

these concerns are legitimate and substantial, an employer is entitled to discuss the confidentiality concerns and try to develop preventative measures tied to the release of the information. *Silver Bros. Co.*, 312 N.L.R.B. 1060 (1993). In *Roseburg Forest Prods. Co.*, 331 N.L.R.B. No. 124 (2000), the Board held that an employer violated § 8(a)(5) by failing to disclose medical information to a union concerning a disabled employee. The union requested the information after the employer assigned the employee out of seniority order to a sought-after job to accommodate the employee's disability. The employer, relying on its obligation under the ADA to keep medical information confidential, refused to comply with the union's request. The Board held that the employer must either provide the information promptly, or attempt to accommodate its confidentiality concerns and the union's need for the information.

(3) Assurances Required. When producing financial records, an employer has the right to demand assurances from the union that it will protect the confidentiality of the documents. *See King Soopers, Inc.,* 344 N.L.R.B. No. 104 (2005) (the Board balances the union's need for requested financial information against any legitimate and substantial confidentiality interests of the employer).

c. Lack of Relevance: Information About Other Plants. A union has a right to information about the operations of a nonunion plant run by the employer only if the union can show that the information is relevant and useful to its representation of employees it represents. *Bohemia, Inc.*, 272 N.L.R.B. 1128 (1984). In addition to the requirement of relevancy, the Board also requires that the union show the specific scope of the information where it relates to employees outside the bargaining unit. *Island Creek Coal Co.*, 292 N.L.R.B. 480 (1989), *enf'd*, 899 F.2d 1222 (6th Cir. 1990).

Double-Breasted Operations. An employer is obligated to provide information as to its relationship with nonunion firms when the union reasonably believes the employer is operating a "double-breasted operation" or that the employer is contracting work away to a plant that is the employer's alter ego. *Blue Diamond Co.*, 295 N.L.R.B. 1007 (1989); *Pence Constr. Corp.*, 281 N.L.R.B. 322 (1986).

To be entitled to information, the union's request must be related to the union's function as a bargaining representative.

d. Waiver. A union can waive the right to obtain specific information, but it must be in clear and unmistakable language. *United Aircraft Corp.*, 204 N.L.R.B. 879 (1973). The employer must, however, furnish information at appropriate times, such as when the contract is being renegotiated. *McDonnell Douglas Corp.*, 224 N.L.R.B. 881 (1976).

e. Form of Information Supplied to Union. Generally speaking, the employer may supply information to a union in a form generally accepted in business; however, the information cannot be supplied in a manner so burdensome or time consuming as to impede the collective bargaining process. *Cincinnati Steel Castings Co.*, 86 N.L.R.B. 592 (1949).

An employer may also avoid violating its duty to bargain when it provides information to the union in a form other than that requested by the union. *Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983). When the employer allows the union free access to its records and fully cooperates with the union in answering questions, it does not have to thoroughly furnish information in a more organized form than that in which it keeps its own records. *NLRB v. Tex-Tan, Inc.*, 318 F.2d 472 (5th Cir. 1963).

5. Timeliness in Responding to the Union's Information Request. An employer must comply with a union's demand for information within a reasonable period of time. A lengthy

delay in furnishing information may support an argument that the employer has violated § 8(a)(5) of the Act.

F. Management Rights, Power, Authority, and Functions. Upon certification or recognition of the union, management's exclusive right to manage has been lost. Even in the absence of a collective bargaining agreement, the presence of a union prevents management from making any changes in wages, hours, terms, or conditions of employment, unless and until it has bargained with the union to impasse. In *Brooks v. NLRB*, 348 U.S. 96 (1954), the U.S. Supreme Court held that generally, an employer must bargain with a union that has won an election for a year even if the employer believes the union has lost its majority status.

The Board holds that an employer is obligated to bargain regarding changes in terms and conditions of employment even during the term of the collective bargaining agreement, unless there is "a clear and unmistakable waiver" from the union. The collective bargaining agreement itself is the best and safest way to "prove" such a waiver. When a specific waiver can be discerned, the employer may take unilateral action. The Board holds that if there is a specific waiver, bargaining has effectively already occurred with regard to that issue. Therefore, unilateral action is proper.

A collective bargaining agreement simply memorializes the parties' negotiations. It can: (1) memorialize a whole series of "waivers" by the union, or (2) memorialize a whole series of limitations on management rights.

Management Rights Define a Strong Agreement. Management wants an agreement with few limitations. The agreement should contain strong language that evidences that the union has waived its right to negotiate on as many subjects as possible. Thus, management will be able to continue to manage unilaterally during the term of the contract just as before the union was certified. The U.S. Supreme Court holds that it is not a *per se* unfair labor practice to insist upon a broad management rights clause. *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952).

The Board holds that even when the parties have bargained on an issue, management does not have the automatic ability to implement its desires because a union waiver will not be presumed unless there is "clear and unequivocal evidence establishing that the union made a conscious decision to relinquish its rights." *Henry Vogt Machine Co.*, 251 N.L.R.B. 363 (1980), *enforcement denied*, 718 F.2d 802 (6th Cir. 1983).

Modern Requirements for Valid Management Rights. Many years ago, it was possible to retain management's right to manage by simply stating that management reserved all rights not given up through the agreement. Over the years, however, arbitrators and the Board have increasingly refused to find such language effective in retaining management's right to manage. Today, the only safe management rights clause sets forth and retains every specific management right that management intends to retain, resulting in such clauses often being of considerable length.

A contract clause reserving to management the right to determine "shift schedules and hours of work" was found to permit the employer to increase a regular Saturday overtime shift from five hours to eight, over union objection. *United Technologies Corp., Hamilton Standard Div.*, 300 N.L.R.B. 902 (1990). Where a reasonable interpretation of an arbitrator's decision was that the management rights clause authorized implementation of an absence control policy, the employer's implementation of such a policy during the term of the CBA was not an unfair labor practice. *See Smurfit-Stone Container Corp.* 344 N.L.R.B. No. 82 (2005).

G. Employer Techniques in Negotiation. In determining bargaining techniques, the employer should first determine the long-term employee relations objective to be achieved. Also, at the onset of negotiations management should realistically evaluate its ability and willingness to withstand union concerted activity (*i.e.,* a strike).

1. Importance of the Initial Contract. The first collective bargaining agreement is by far the most important because it sets the pattern for future negotiations. A union is generally weakest at the time the first contract is negotiated. Therefore, the union is most willing to make concessions at this time. Management should be able to substantially improve its position in terms of wages, hours, and terms and conditions of employment. Management should also be able to obtain an extremely strong management rights clause and, if it agrees to arbitration, impose a total restriction on the ability of the arbitrator to substitute his judgment for that of management.

The union is generally not as interested in wages or benefits in the first contract. It is much more interested in clauses that will strengthen its position and enable it to sink its roots deeply into the organization. Accordingly, it wants strong clauses regarding: (1) check-off; (2) arbitration; (3) seniority; and (4) grievance processing rights.

2. Ground Rules. The first negotiating session, try to establish ground rules including: frequency of meetings; length of meetings; that noneconomic subjects will be discussed and agreement reached before turning to economic subjects; and taking of minutes.

3. Terms. When making detailed proposals, management must first assess the likelihood of success in obtaining detailed terms. If management proposes specific, detailed terms and is unsuccessful, management may be in a less favorable position when administering the agreed upon contract.

4. Establish Credibility. Take steps to establish credibility.

5. Basic Considerations in Negotiations.

a. Take advantage of superior strength. If the employer is in a stronger bargaining position than the union, it is permissible for the employer to take advantage of this fact and "to use its advantage to retain as many rights as possible." *Chevron Oil Co. v. NLRB*, 442 F.2d 1067 (5th Cir. 1971). *See also Barry-Wehmiller Co.*, 271 N.L.R.B. 471 (1984). A union may also take advantage of its greater strength during bargaining;

b. Employers are generally able to determine internally the wage and fringe benefit levels that are necessary to sustain the organization. But, employers generally tend to be much less concerned about retaining as many rights as possible and maintaining the maximum degree of control through the negotiation of waivers. This, may in fact, be crucial in the long run;

c. Select a chief negotiator to negotiate for the company:

- She or he should do all of the talking unless it is previously understood that someone else from the management negotiating team will speak on a certain issue;
- Do not let a union negotiator trick your team into having someone else do the talking; and
- If necessary, recess the session in order to discuss or solidify the management's position.

d. Determine what wages and benefits are being paid by other employers in your industry and by other employers in your area. Use this information to assist in bargaining;

e. Cost out management's proposals as well as the union's proposals;

f. Try to bargain from management's proposals rather than from the union's proposals;

g. Do not accede too quickly to union demands. Certain demands can be key bargaining tools such as union security provisions, dues check-off, and successorship clauses;

h. If the union makes a costly wage proposal, do not state that you are financially unable to make such payments unless management is willing to supply financial information upon the union's demand; and

i. Make final agreement on all contract provisions contingent upon reaching an overall agreement. To be effective, get union's agreement at a ground rules session.

H. Important Contract Terms: Cornerstones of the Collective Bargaining Agreement.

1. Management Rights Clause. As noted above, employers should push for a strong management rights clause. Employers should aim for the right to make unilateral changes on any subject not specifically prohibited by agreement. The negotiator should then include a list in the contract of every change an employer might want to make during the term of the contract.

2. Zipper Clause. Absent a zipper clause, an employer is not relieved of the duty to bargain with regard to subjects that were neither discussed during negotiations nor embodied in any of the terms of the contract. A "zipper" clause may limit the issues that are subject to bargaining. The NLRB suggests a willingness to interpret zipper clauses broadly, perhaps to the point of authorizing unilateral changes by the employer. *Columbus & Southern Ohio Electric Co.*, 270 N.L.R.B. 686 (1984), *enf'd*, 795 F.2d 150 (D.C. Cir. 1986). More commonly, though, the Board has recognized that the normal function of such clauses is to maintain the status quo, not to facilitate unilateral changes. *Murphy Oil USA, Inc.*, 286 N.L.R.B. 1039 (1987); *Suffolk Child Dev. Center, Inc.*, 277 N.L.R.B. 1345 (1985).

A zipper clause creates a waiver by the union of bargaining during the term of the contract. The language in this area of the law has become relatively standardized, and unions are frequently willing to accept such clauses with little resistance. Employers may also wish to push for a waiver by the union of bargaining over the decision to make a unilateral change and the impact of that decision when management makes unilateral changes during the term of the contract.

3. Grievance and Arbitration Clause. Tailor the grievance and arbitration clauses to meet management's objectives.

a. Definition of Grievance. A grievance is a dispute that a union member or the union has with the employer regarding the employment relationship. These disputes tend to involve various levels of discipline and contract interpretation. A grievance may also indicate what the contract does not say about an issue as well as the prior practice of the parties regarding the issue in dispute. Consider a limiting definition.

b. Who Can File a Grievance. Absent contractual language to the contrary, individual bargaining unit members and the local union may file grievances.

c. Timeliness of Grievance Filing. Generally, a grievance procedure will consist of a series of steps in which different levels of union and management leadership meet to attempt to resolve a problem in the employment relationship. Usually, each step in the grievance procedure creates a mini "statute of limitations" with a window period in which to file the grievance and bring the grievance to the next step in the process. Failure to follow these time limits may nullify a grievance to the extent that an arbitrator would find it not procedurally arbitrable. If the contract does not contain time limitations for grievances, an arbitrator may still refuse to decide the merits of a grievance if the

grievance is filed so long after the acts giving rise to the grievance that it would be unfair to the employer for the matter to go forward.

d. Limiting Arbitration of Certain Grievances. Parties are free to negotiate the issues that are to be arbitrable. For example, in *Teamsters Local 371 v. Logistics Support Group*, 999 F.2d 227 (7th Cir. 1993), the court upheld the employer's refusal to arbitrate a grievance over an employee's termination, finding that the employer had acted within its rights under the arbitration clause of the collective bargaining agreement since the agreement specified clearly that the employer had exclusive authority over discharge decisions. Further, since the agreement specified that only alleged violations of express contractual terms were grievable, the union was not entitled to arbitrate.

e. Pay for Grievance Handling. The union wants pay for grievance handling so that stewards and employees will have an incentive to spend time not only in the processing of old grievances, but also in the development of new ones. Management should avoid such clauses. Ambiguous words such as pay for time spent "processing" grievances may be construed to include time spent roving the premises to determine whether grievances exist.

f. Authority of Arbitrator. The parties may agree upon limitations to the arbitrator's authority. However, in the absence of explicit limits on his or her authority, arbitrators must "hang their hat" on a contractual provision in deciding a grievance. If the decision fails to "draw its essence from the contract," violates public policy, or if the arbitrator shows a great deal of bias, the decision may be overturned in court. *See United Paperworkers International Union v. Misco, Inc*., 484 U.S. 29 (1987); *Beaird Indus. Inc. v. Local 2297 Int'l Union,* 404 F.3d 942 (5th Cir. 2005) (where contract clearly and unambiguously preserved the company's right to subcontract with no limits, the Fifth Circuit reversed the arbitrator's decision ordering the employer to restore subcontracted work to bargaining unit employees, finding "the Arbitrator has failed utterly to draw his conclusions from the essence of the CBA.")

4. Work Schedules and Hours of Work. Employers should push for as much flexibility in this area as possible. With just-in-time manufacturing becoming the rule, employers must fight hard to ensure that they can make scheduling decisions with little or no interference from a union. Employers should also attempt to secure broad rights in the assignment of overtime work to meet daily needs.

5. Seniority and Superseniority.

a. Seniority. The union wants it because: (1) long-term employees who do not advance into management are frequently strong union supporters; (2) aggressive, more junior employees on the way up are generally not strong union supporters; (3) making decisions by seniority spares the union from having to take positions between its members. Management should be cautious about the role of seniority because, while seniority may spare management from making unpopular choices, the limitation on management's ability to efficiently manage the workforce is obvious.

b. Superseniority for Union Stewards. The union wants superseniority to insure it has representatives in the plant whenever possible and to increase the benefits and status of being a steward. Management should recognize: (1) there are legal limits to the ability to grant superseniority to union stewards; (2) it has little reason to make stewardship a "status" position; (3) it helps the union sink its roots in the organization.

6. No Strike Clause. A no strike clause, which is usually negotiated in exchange for a grievance and arbitration clause ("quid pro quo"), usually limits a union's members from

striking over a grievance the employer refuses to adjust to their satisfaction. These clauses, however, may implicate further limits on the right to strike.

The union may be willing to agree to a clause in which it agrees not to "authorize" a strike during the contract term. If not, management should insist upon an article that: (1) prohibits all strikes, especially including sympathy strikes and boycotts; (2) includes a requirement that the union use its best efforts (spelled out with particularity) to stop any strike that occurs and that a failure to do so constitutes an authorization of the strike; and (3) provides that if the contract remains in effect pending the negotiation of a successor contract, then the no strike provision remains in effect as well. Employers should push for a clause that prohibits union members from engaging in unfair labor practice strikes during the term of the contract. A waiver of this statutory right must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). The Board has found that a no strike/no lockout clause that specifically stated it was intended to prohibit conduct that would lead to the suspension of work due to labor disputes did not preclude employees from engaging in picketing a shareholders' meeting, which was held more than seventy miles away from the employees' worksite. *Engelhard Corp.,* 342 N.L.R.B. No. 5 (2004), *enf'd* 437 F.3d 374 (3d Cir. 2006). Accordingly, the Board held that the employer unlawfully suspended the employees who engaged in the picketing.

7. Management Work Rules. Work rules are considered a mandatory subject of bargaining. *Tower Hosiery Mills, Inc*., 81 N.L.R.B. 658 (1949), *enf'd*, 180 F.2d 701 (4th Cir. 1950). Unions are, at times, willing to give a broad waiver in the management rights clause giving management the right to establish and impose working rules during the term of the agreement. This is generally preferable to including the work rules in the contract.

8. Successorship. The union wants such a clause to facilitate representation of employees of any successor company should the employer sell the facility. Moreover, such a clause may create an "action" against selling company. Management should avoid agreeing to a clause limiting its flexibility should the company sell because: (a) it could impede sale of the business even though it is not binding on successor; and (b) management could be held liable for breach of contract if the successor disavows the contract.

For a further discussion of successorship, see the *Corporate Restructuring* Chapter of the SourceBook.

9. Union Dues Check-Off. The union wants a dues check-off so it will not have to alienate employees when collecting dues. A dues check-off reduces net pay to employees who often forget about it and blame management for the smaller paycheck. Under most circumstances, management should be cautious about refusing to agree to such a clause. In 1985 the Board overruled prior law and upheld an employer's insistence to impasse on discontinuing dues check-off, where the employer's rationale was to avoid the check-off being used to prove management knowledge of union membership in unfair labor practice cases. *American Thread Co*., 274 N.L.R.B. 1112 (1985). In determining whether to agree to dues check-off, employers should consider changes in law, the likelihood of a strike, bargaining over cost, and whether they deduct for other "causes."

10. Discipline and Discharge. The union usually will propose a "just cause" provision or some similar limitation on management's authority to discipline and discharge. There is no *per se* requirement that management agree to a "just cause" provision, and management may be able to avoid such language, but beware of a charge of overall bad faith. Consider a "substantial evidence" standard as a possible compromise. Always bargain to limit an arbitrator's discretion.

11. Advance Planning for Renegotiation at Contract Expiration. When the contract expires, the union may strike. The employer can act now to increase its leverage down the road. Strikers may (or may not) be entitled to vacation pay and group health insurance while on strike, depending upon contract wording. *Nuclear Fuel Serv., Inc*., 290 N.L.R.B. 309 (1988) (vacation pay lawfully denied to strikers since not "accrued" under language of contract).

I. Preparation for Negotiations and Possibility of a Strike.

- ***Select a Management Team.*** The employer should consider its goals in negotiations and select team members who can best work to meet these goals. Also, selecting a speaker with a good relationship with union leaders may avert a strike and promote advantageous negotiations;
- ***Compile Economic Data.*** The use of economic data may be crucial. If employees are supplied factual basis for employer concerns, labor strife may be avoided even though concessions are gained;
- ***Set Ground Rules for Negotiations.*** Setting ground rules may lead to more harmonious negotiations. If employees are clear on when/where meetings can be held, what will be discussed at each meeting, etc., negotiations will run more smoothly. Note that an employer can be found guilty of a refusal to bargain if it is not fair regarding time/place of negotiations;
- ***Develop a Theme for Particular Negotiations.*** A theme is important so employees understand the employer's concerns. For example, if an employer is attempting to dramatically improve efficiency, then its theme could be the tying of economic benefits to an efficiency goal plan. Thus, whenever an economic issue comes up, the management team can push the union to discuss efficiency;
- ***Communicate With Bargaining Unit.*** Communications to employees during negotiations may be critical and may be a means of pressuring union leaders who often limit the information employees get from the bargaining table. The Board has recognized the employer's right to communicate directly with its employees provided the union is not bypassed. *United Technologies Corporation*, 274 N.L.R.B. 609 (1985), *enf'd*, 789 F.2d 121 (2d Cir. 1986); and
- ***Use of Mediation Services.*** If the company is in a strong bargaining posture, use of a mediation service is less important. If, however, company is not prepared to take a strike, use of mediation service may help to move union off adamant positions. Do not automatically involve mediation service; timing is important. Employers should recognize the goal of mediation services. In using mediation service, employers should recognize that they may be bargaining with the mediator as the other side's representative.

III. STRIKES, LOCKOUTS, AND BOYCOTTS

A. Definition of "Concerted Activity." Concerted activity includes the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of employees' own choosing, strikes, boycotts, picketing, and leafleting. The concerted activity must also be protected for the Act to shield employees from employer discipline. Note that §7 of the NLRA gives covered employees the right to engage in concerted activities even though no union activity is involved and even though no collective bargaining is contemplated by the employees involved. *NLRB v. Phoenix Mutual Life Insurance Co*., 167 F.2d

983 (7th Cir. 1948). For a further discussion of protected concerted activity, see the *NLRA's Impact on the Workplace* Chapter of the SourceBook.

B. Types of Strikes. There are three types of strikes – economic strikes, unfair labor practice strikes, and illegal (unprotected) strikes.

1. Economic Strikes. Economic strikes generally seek, in some lawful manner, to change some facet of the employment relationship, *i.e.,* wages, hours, terms and conditions of employment.

Economic strikers may be permanently replaced; that is, strikers have no statutory claim to their jobs if they strike for economic ends and employers may replace them with new employees on a permanent basis. If there are insufficient jobs for the economic strikers to fill upon their unconditional offer to return to work, they need not be immediately reinstated, but must be placed on a preferential hiring list from which the former economic strikers must be rehired to fill openings as they occur prior to hiring new employees. *Laidlaw Corp*., 171 N.L.R.B. 1366 (1968), *enf'd*, 414 F.2d 99 (7th Cir. 1969). Permanent replacements who lose their jobs through a strike settlement in which the employer agrees to terminate them and return the replaced strikers may sue the employer for damages. *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983). *But see Tobin v. Ravenswood Aluminum Corp*., 838 F. Supp. 262 (S.D. W. Va. 1993), in which the court dismissed most of the claims filed against the employer by employees who were hired during a strike but were let go when the strike was settled. The court reasoned that the replacements signed forms releasing all claims against the employer in exchange for one month's pay, accumulated vacation, and the employer's contribution of medical insurance for three months. Therefore, the replacements were without a remedy.

2. Unfair Labor Practice Strikes. An unfair labor practice strike is a strike, in whole or in part, over employer unfair labor practices. An economic strike may be converted into an unfair labor practice strike due to employer unfair labor practices. The commission of an unfair labor practice during a strike does not automatically convert the strike into an unfair labor practice strike. Rather, the union or the NLRB must show that the unlawful conduct was a factor in prolonging the strike. *F.L. Thorpe & Co. v. NLRB*, 71 F.3d 282 (8th Cir. 1995).

Employees can only be temporarily replaced and not permanently replaced in an unfair labor practice strike. They must be offered their jobs back upon making an unconditional offer to return to work. *Trading Port, Inc*., 219 N.L.R.B. 298 (1975).

3. Unlawful Strikes (Unprotected). Even if a strike has a lawful goal, when unlawful methods are used to achieve that goal, the strike may be declared unprotected.

a. Employee Rights. Employees engaged in an unprotected strike may be discharged with no right of reinstatement.

b. Examples of Unlawful/Unprotected Strikes.

- Repeat, intermittent, or quickie-type strikes. In *Audobon Health Care Center,* 268 N.L.R.B. 135 (1983), nurses aides at a nursing home refused to work in a section of the facility left open by another aide, who had left work early because of illness. The nurses' aides were discharged. The Board found that since they did not completely walk off the job, but engaged in a partial strike, their actions were unprotected and their terminations were lawful.
- Work stoppages that extend beyond a reasonable period of time. Although employees have a § 7 right to engage in protected, concerted activity, such as peaceful work stoppages, to protest their terms and conditions of employment, if that protest continues beyond a reasonable period of time, the work stoppage may

be determined to be unprotected. *See Quietflex Mfg. Co.,* 344 N.L.R.B. No. 130 (2005) (peaceful twelve-hour protest of eighty-three employees was protected concerted activity but lost its protection when the employees refused to vacate employer's property after being told to return to work or leave for the second time because refusing to leave the property served no protected employee interest and interfered with the employer's use of its property). In *Quietflex,* the Board held that "[t]o determine at what point a lawful on-site work stoppage loses its protection, a number of factors must be considered and the nature and strength of competing employee and employer interests must be assessed. The Board identified the following ten factor to use in determining whether the employer's property rights or the employees' § 7 rights should prevail in the context of an on-site work stoppage:

i) The reason the employees have stopped working;

ii) Whether the work stoppage was peaceful;

iii) Whether the work stoppage interfered with production or deprived the employer of access to its property;

iv) Whether employees had adequate opportunity to present grievances to management;

v) Whether employees were given any warning that they must leave the premises or face discharge;

vi) The duration of the work stoppage;

vii) Whether employees were represented or had an established grievance procedure;

viii) Whether employees remained on the premises beyond their shift;

ix) Whether the employees attempted to seize the employer's property; and

x) The reason for which the employees were ultimately discharged.

In *Quietflex* the Board found that the employer's property rights outweighed the employees' § 7 rights, noting that the employer made reasonable efforts to respond to the employees' requests and that the employees indicated they would not leave the employer's premises until all of their demands had been met, including a pay increase, which the employer had already stated it could not grant. Additionally, the Board noted that the employees were fired for refusing to leave the employer's premises, not for refusing to return to work. The Board determined that after many hours of protest, the employees' continued presence no longer served an immediate protected interest and the employer was entitled to assert its private property right. In other cases, shorter, peaceful protests have been held to be protected. *See, e.g., Roseville Dodge, Inc. v. NLRB,* 882 F.2d 1355 (8th Cir. 1989) (court agreed with the Board that employees who peacefully remained at their work stations in a sincere effort to talk with management concerning their protest over wages did nothing wrong or illegal; the work stoppage was a peaceful attempt by unsophisticated workers to notify the company, which did not have a grievance procedure, of their dissatisfaction with working conditions because other methods of communication had proven futile.)

- Striker misconduct. Employees engaged in an economic or unfair labor practice strike can lose the protection of the Act by engaging in improper conduct on the picket line. The Board holds that verbal misconduct can justify denial of

reinstatement to a striker, provided that the misconduct "may reasonably tend to coerce or intimidate" other employees. *Clear Pine Mouldings, Inc.*, 268 N.L.R.B. 1044 (1984), *enf'd*, 765 F.2d 148 (9th Cir. 1985). This includes conduct that blocks ingress or egress. *Capital Bakers Div. of Stroehmann Bros. Co.*, 271 N.L.R.B. 578 (1984). A union can be held liable for damages for the actions of its members if the union's officers or members authorized, participated in, or ratified tortious acts. *Labor's Int'l Union v. Rayburn Crane*, 559 So. 2d 1219 (Fla. 2d DCA 1990). Employees seeking to engage in direct dealing or bargaining with their employer in circumvention of a majority union's contract could be deemed to be engaged in unprotected conduct. *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975).

- Failure to file notice with FMCS. In *Boghosian Raisin Packing Co.,* 342 N.L.R.B. No. 32 (2004), the Board held that an employer legally fired economic strikers based on the union's failure to notify the Federal Mediation and Conciliation Service (FMCS) of the existence of a labor dispute that might lead to a strike as required by § 8(d) of the NLRA. The failure to provide the notice, even though it was caused by the union's clerical error, rendered the strike illegal, thus the strikers could be fired.

4. Strikes In Breach of A No-Strike Clause. In *Indiana & Michigan Electric Co.*, 273 N.L.R.B. 1540 (1985), *enf'd*, 786 F.2d 733 (6th Cir. 1986), a contract clause required the union to disavow publicly any unlawful strike, and to take whatever affirmative action was necessary to bring about a quick termination of the strike. The Board held that the employer's five-day suspensions of two union shop stewards who participated in and took no action to halt the work stoppage did not violate § 8(a)(3) or 8(a)(l) of the Act even though lesser discipline was imposed on other employees who were not leaders in the union.

In *Engelhard Corp. v. NLRB,* 437 F.3d 374 (3d Cir. 2006), the Third Circuit affirmed the Board's determination that employees who engaged in peaceful picketing at the employer's corporate headquarters did not violate a no-strike provision in the employees' collective bargaining agreement because it did not involve any work stoppage at the plant, which was 50 miles away from the headquarters. Accordingly, the court denied the employer's petition for review of the Board's decision that its suspension of the employees who engaged in the picketing violated §§ 8(a)(1) and (3).

C. Employer Rights During Strike.

1. Hiring of Replacements. An employer is free to advertise for help during a strike. Be careful of state laws concerning disclosures about the strike in such advertising.

2. Use of Nonbargaining Unit Employees and Contractors to Perform Bargaining Unit Work. In addition to having the right to hire permanent replacement employees in an economic strike, a company can subcontract its work to discharge employees who engage in an unlawful strike, and temporarily replace unfair labor practice strikers. The Board, however, takes the position that a "permanent" subcontract must be bargained about before implementation, even in response to a strike. *See Land Air Delivery, Inc. v. NLRB*, 862 F.2d 354 (D.C. Cir. 1988). An employer also has the right to have supervisors, salesmen, and other nonunit employees perform the unit work during the strike.

3. Lockout. An employer may lockout all or part of the unit employees to apply economic pressure in support of its bargaining goals.

4. Implementation of Last Offer. An employer can implement the terms of its last offer if impasse has been reached. The employer may, if it is winning a strike, lawfully withdraw prestrike concessions made to avoid the strike and otherwise modify its offer in recognition

of its increased "economic muscle" so long as it is not done with "an intent to frustrate the bargaining process and thereby preclude the reaching of *any* agreement." *Barry-Wehmiller Co.*, 271 N.L.R.B. 471 (1984).

D. Rights of Strikers.

1. Right to Return to Work. Unfair labor practice strikers may return to work upon their unconditional offer, and the employer must reinstate them. This may result in firing replacements because every employee on an unfair labor practice strike has a right to return to work limited only by the employer's valid need for employees. Economic strikers, however, may be permanently replaced, and, upon offering to return to work, may be placed behind permanent replacements hired in their absence.

2. Right to Cross Picket Line and Work. Just as employees have the § 7 right to engage in the concerted activity of striking and picketing, they also have the right not to engage in such activity. Therefore, employees may cross the picket line and work, but should resign from the union before doing so or they face the possibility that the union may fine them and seek enforcement of those fines in state court. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967).

E. Rights of Strike Replacements. Strike replacements may come from inside or outside the company. The employer may set new terms and conditions of employment for striker replacements even in the absence of an impasse in bargaining. *Marbro Co.*, 284 N.L.R.B. 1303 (1987), *aff'd*, 310 N.L.R.B. 1145 (1993). The Board permits an employer to permanently replace an employee by shifting a nonstriking employee to fill a striking employee's job; however, it must be clear that this is being done on a permanent basis. A company should keep a good supply of employment applications on hand in order to contact these applicants should a strike occur. The Board holds that the date the employer commits to make a replacement employee permanent is controlling, not the date the employee actually begins working. If a company decides to employ permanent replacement employees, it is important to keep those employees on the job after the strike ends and not give in to union demands that replacements be discharged with the strikers getting their former positions back. Employees who cross a picket line and return to work during a strike may be retained as permanent replacements when the strike is over, even if full-term strikers have more seniority. *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426 (1989).

An employer may not lawfully refuse to return unfair labor practice strikers to their positions upon their unconditional offer to return to work. Employees who are hired to take the positions of the strikers may, if told they are permanent replacements, have a lawsuit against the employer. *See Belknap, Inc. v. Hale*, 463 U.S. 491 (1983). In *Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F.3d 1010, 1016 (9th Cir. 2000), replacement workers who were laid off six months after a strike ended brought various state law claims, including fraud and breach of contract, against the employer. The replacements claimed they were told they would not be replaced by returning workers when they were hired, yet were chosen for layoff because of their low seniority. The court held that the replacements' fraud and breach of contract claims were pre-empted by the LMRA because they could not be decided without interpreting the layoff and seniority provisions of the CBA.

In a strike situation, one of the major problems for an employer is determining whether the strike will be deemed to be an unfair labor practice strike or an economic one. Back pay can be considerable should the employer erroneously conclude that the strike is an economic strike. Under COBRA, a strike may constitute a qualifying event that will allow the striking employee to obtain sixty or more days of health insurance protection without any requirement of immediate payment.

F. Lockouts. The Board and courts have recognized both offensive and defensive lockouts.

1. Defensive Lockouts. A defensive lockout is lawful when the employer, in anticipation of a strike, uses a lockout to avoid unusual operational problems or economic losses over and beyond the ordinary losses incurred during a strike. The lockout, however, may not be tainted by union animus. A defensive lockout can also be justified in a multi-employer setting when the lockout is meant to avoid a "whipsaw strike" against one member of the multi-employer group. A "whipsaw strike" is an attempt by a union to break up a multi-employer bargaining unit by striking only one member. This divide and conquer philosophy could provide unions with a means of overpowering each individual employer if and when the unit breaks up.

2. Offensive Lockouts. According to the U.S. Supreme Court, the use of offensive lockouts does not violate the Act. *American Ship Bld. Co. v. NLRB*, 380 U.S. 300 (1965) (finding no violation of the Act where intent of employer in locking out employees is merely to bring about a settlement of a labor dispute on terms favorable to the employer); *NLRB v. Brown*, 380 U.S. 278 (1965).

However, the Board has rejected a hospital's argument that its refusal to hire workers who were striking another hospital was a legal economic weapon analogous to offensive lockouts permitted in *American Ship Building*. In *Allina Health System, d/b/a Abbott Northwestern Hospital, et al,* 343 N.L.R.B. No. 67 (2004), in a 2-1 decision, a panel of the Board held that the respondent hospitals' refusal to hire as temporary workers nurses who were striking another hospital was an unfair labor practice. In this case, the respondents were a group of hospitals that had been a multi-employer bargaining unit that had negotiated with the Minnesota Nurses Association, which represented nurses at the hospitals. Prior to negotiations in 2001, the hospitals abandoned the multi-employer bargaining unit format and formed a "coordinated bargaining plan." Under this plan, the hospitals bargained with the nurses' union separately but coordinated their strategy. They formed an advisory committee through which they shared information and formulated common goals for the negotiations. The goal of their strategy was to obtain common results, especially on economic issues; however, each hospital remained free to settle on individual terms. The members of the advisory committee agreed to help each other withstand a strike, if one occurred. As part of their common strategy, the advisory committee members agreed that if the Union struck any of them, the other members would refuse to employ any of the striking nurses during the strike.

The hospitals negotiated separately with the union and, after receiving a notice of intent to strike from the union, all but one of them reached an agreement. The agreements all included no-strike/no-lockout clauses. The union commenced a strike at the hospital with which it had not reached an agreement. The other hospitals told temporary agencies not to send striking nurses to them as temporary workers and threatened to fire the agencies who did so.

The ALJ held that the refusal to hire the striking workers was an unfair labor practice and the Board affirmed this decision. The Board rejected the hospitals' argument that their refusal to hire the striking nurses was motivated only by a desire to support their coordinated-bargaining partners and to protect their economic interests and not by antiunion animus. The hospitals argued that had they hired the striking nurses, the nurses might have been able to remain on strike for a longer period of time and thereby might have been able to negotiate higher wage rates at the hospital subject to the strike, which would have adversely affected the hospitals' ability to retain or hire workers at lower contract rates. The Board rejected this argument, holding that the hospitals had resolved their economic concerns through collective with the union and were not parties to the labor dispute between the union and the hospital subject to the strike. The Board pointed out that the hospitals had abandoned multi-employer

bargaining in favor of individual bargaining and that if they had wanted to protect themselves from the consequences of what other hospitals might agree to, they could have remained in the multiemployer bargaining relationship with the union.

3. Partial Lockout. In *Local 15, IBEW v. NLRB (Midwest Generation),* 429 F.3d 651 (7th Cir. 2005), *cert. denied,* 127 S. Ct. 42 (2006), the Seventh Circuit held that an employer's lockout of employees who were on strike at the time of the union's unconditional offer to return to work, while not locking out employees who, prior to the unconditional offer, had returned or scheduled a return to work was an unfair labor practice. The Seventh Circuit held that the partial lockout was not justified by operational needs because the employer had successfully continued its business operations before any employees crossed over, thus it failed to demonstrate that it needed the crossovers and non-strikers to continue its business operations. "Simply put, to justify a partial lockout on the basis of operational need, an employer must provide a reasonable basis for finding some employees necessary to continue operations and others unnecessary." The court also found that the partial lockout was not justified as a lawful means of economically pressuring holdouts. The court rejected the employer's argument that additional pressure was not needed for crossovers since they had already demonstrated they were no longer committed to the union's position, since there was no evidence regarding why the employees crossed over. Further the court noted that when the employer announced the partial lockout, all employees in the collective bargaining unit had removed themselves from the economic strike by offering to return to work. The court found that the employer's action in this case appeared to demonstrate antiunion animus because the only distinction between the employees who were locked out and those who were not was their participation in union activities. Thus, the court held that the partial lockout was an unfair labor practice. *See also United Steel, Paper & Forestry, Rubber Mfg., Engergy, Allied Indus. & Serv. Workers Int'l Union v. NLRB (Bunting Bearings Corp.),* 179 Fed. Appx. 61, 2006 U.S. App. LEXIS 11221, 179 L.R.R.M. (BNA) 2896 (D.C. Cir. 2006) (employer committed ULP when it locked out nonprobationary employees, who were union members, while using probationary employees to run its operations; rejecting Board's contention that the union failed to establish that the employer's conduct was discriminatory since the lockout "could have adversely affected employee rights to some extent").

4. Replacements. The Board and courts have permitted an employer to lock out employees and temporarily replace them. In *Harter Equipment, Inc.*, 280 N.L.R.B. 597 (1986), the Board held that, absent specific proof of antiunion motivation, an employer may hire temporary replacement employees after locking out permanent employees for the sole purpose of bringing economic pressure to bear in support of the employer's legitimate bargaining position.

G. Maintenance of Benefits and Contract Provisions During Strike.

1. General Rule. An employer may not refuse to pay "accrued" benefits to strikers, while paying them to nonstrikers. *See NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). On the other hand, an employer is not required to "compensate" strikers for the time they are not working. Determining what constitutes an "accrued" benefit may be difficult. *See Amoco Oil*, 286 N.L.R.B. 770 (1987); *Texaco, Inc.*, 285 N.L.R.B. 241 (1987).

2. Cessation of Insurance Premium Payments. Unless otherwise obligated under the collective bargaining agreement, an employer may discontinue payment of life, health and disability insurance premiums for striking employees during the period they are on strike. *Sherwin-Williams Co.*, 269 N.L.R.B. 678 (1984); *Simplex Wire & Cable Co.*, 245 N.L.R.B. 543 (1979); *Trading Port, Inc.*, 219 N.L.R.B. 298 (1975). Under the Consolidated Omnibus Budget Reconciliation Act of 1985, 29 U.S.C. §§ 1161-68 (COBRA), an employer must offer a striking employee the right to maintain coverage and assume payments that otherwise

would be made by the employer. *Communication Workers of America, Dist. One v. Nynex Corp.*, 898 F.2d 887 (2d Cir. 1990). Thus, employees have a forty-five day grace period in which to submit premium payments for continuing coverage. *Id.*

3. Beware of Discriminatory Application. The above cases deal with the employer's right to cease payments under § 8(a)(5) of the Act, describing the employer's duty to bargain. If the employer extends benefits to other employees who are not in active service, the employer may be found in violation of § 8(a)(3) of the Act (prohibiting discrimination) if the employer decides not to extend benefits to strikers because they are not in active service.

H. Preparing for a Possible Strike.

1. Communications.

a. Bargaining Unit Employees. Consider explaining to employees what they can legally lose with respect to their wages and jobs as well as the right and intention of the company to operate during a strike. Do not promise employees any benefits or threaten them to get them to consider crossing the picket line; and

b. Supervisors and Managers. Call a meeting of managerial, office, supervisory personnel, salespeople, and any other employees whom the employer has previously determined will work during a strike. Advise these individuals of the possibility of a strike, and instruct each on what she or he should do if a strike does occur. Cover the following points: what job each person will do; how they will report for work; where they will park; and when they will report for work. Advise all supervisory employees that the company expects them to report to work regularly and that if transportation is needed, it will be furnished.

2. Physical Steps to Protect Property and Persons. If some or all of the employer's parking is normally some distance from its operations, make arrangements to have the employees who will work during the strike park as close as possible. Determine how the union might sabotage the employer's operations if its employees walk out. If the employer receives advance word of an impending strike, ensure that all of the employer's property is fully covered by insurance. If the employer receives advance word of an impending strike, request that law enforcement officials be present on the day of the expected strike before the time the employees report for work and leave work, and for at least the first week of the strike. Make sure that gates are closed and locked and that all fences around the worksite are in good order. Employ all necessary security personnel to protect the property twenty-four hours a day. If shipments are to be moved in or out by railway or truck line, advise the railway or truck line of the labor dispute and the possibility of a strike and tell them the employer expects delivery to be made regardless of the picket line. Consider making arrangements with a private employment office for interviewing and hiring employees off site.

3. Legal Steps: Gathering Information. Assign at least two competent, levelheaded persons to make a written record of everything said and done by strikers and pickets, giving names, time of day, date, actual words spoken, where incident occurred, and especially specific curse words or threats. Be aware that this must be done in lawful manner. Have a Polaroid-type camera or videotaping equipment on hand with a knowledgeable operator to use in the event any incidents occur that should be photographed.

- Do NOT take pictures of the people peacefully picketing except to get one picture of each picket sign that has different wording; and
- Make arrangements to have a competent photographer, who is not timid, available for immediate call.

I. Settlement of Strike. When settling a strike, a primary consideration is future management credibility both as to maintaining positive employee relations and future bargaining relationships at both the facility involved and other company facilities.

J. Boycotts and Picketing. (For a further discussion of unlawful picketing and handbilling, see the discussion of unfair labor practices in the *Organizing Drives* Chapter of the SourceBook).

1. Consumer Picketing. A union can picket to persuade consumers not to purchase a specific product produced by an employer with whom the union has dispute, *i.e.*, do not buy Washington State apples. *NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760*, 377 U.S. 58 (1964). However, when a struck product has become an integral part of the retailer's entire offering, so that any product boycott is in actuality a boycott of the entire business of the secondary employer, such a boycott becomes unlawful. *Honolulu Typographical Union v. NLRB*, 401 F.2d 952 (D.C. Cir. 1968).

In *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), the U.S. Supreme Court held that a private employer could keep nonemployee union organizers out of its parking lots unless there was no other reasonable means of communicating with employees. *See also United Food & Commercial Workers, Local No. 880 v. NLRB*, 74 F.3d 292 (D.C. Cir. 1996) (due to the availability of mass media, such as newspapers, radio, and television, it is virtually impossible for a union to have grounds to enter an employer's property to petition the employer's customers). In *Salmon Run Shopping Center,* 348 N.L.R.B. No. 31 (Sep. 29, 2006), the Board held that a mall violated § 8(a)(1) by denying access to a union for the purposes of distributing union literature. In this case, the Board held that the mall denied the union access because it was a union seeking to engage in labor-related speech. The Board held that this denial violated the "discrimination" exception to the *Lechmere* decision.

2. Handbilling. The second proviso to § 8(b)(4) affords great protection to labor organizations choosing to handbill. *NLRB v. Servette, Inc.*, 377 U.S. 46 (1964). The prohibitions on secondary boycotts do not reach peaceful distribution of the handbills at a mall, urging customers not to shop at the mall. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Constr. Trades Council*, 485 U.S. 568 (1988). Handbilling can lose the protection of the proviso where it is combined with unlawful picketing. *Warshawsky & Co. v. NLRB,* 182 F.3d 948 (D.C. Cir. 1999).

3. Unlawful Secondary Activity. Section 8(b)(4) is typically thought of as secondary boycott picketing and strikes; however, § 8(b)(4) conduct goes beyond secondary boycott. Section 8(b)(4) prohibits a union from unlawfully inducing or encouraging employees to engage in a strike and from threatening, coercing, or restraining any person engaged in commerce, in order to:

a. Force an employer or self-employed person to join a labor organization or enter into an agreement that is considered a hot cargo agreement, *i.e.*, an agreement prohibited by §§ 8(e)-8(b)(4)(A);

b. Force a business (or other "person") to cease doing business with another business or person and/or to bargain with a union that has not been certified, § 8(b)(4)(B);

c. Force an employer to recognize or bargain with one union when another union has been certified by the Board to represent the employees of the employer, § 8(b)(4)(C); or

d. Force an employer to assign particular work to employees in a particular union or trade rather than some other union or trade. There need not be two competing labor organizations seeking work; rather it may be a violation of this section if an employer assigns work to nonunion employees and a union wants the work for employees it represents, § 8(b)(4)(D).

The protections of § 8(b)(4)(B) are not limited to employers covered by the Act but are available to any individual and are often used by knowledgeable public employers to prohibit unlawful picketing directed against their facilities.

An injured party may both file § 8(b)(4) charges and sue a labor organization for damages under § 303 of the Act for a violation of any of the four subparts of § 8(b)(4). For example, mass "shopping sprees" by the Teamsters were enjoined as an illegal secondary boycott in *Pye v. Teamsters' Local 122*, 61 F.3d 1013 (1st Cir. 1995). The Teamsters organized a demonstration at one of the employer's stores, took up most of the parking spaces, entered the store and created long lines, and generally purchased one small ticket item with large bills. After making purchases, they would leave the store and then re-enter to buy another small ticket item.

Bannering. "Bannering" involves displaying large banners in front of businesses involved in on-going labor disputes to discourage customers from patronizing these businesses. In *Overstreet v. United Bhd. Carpenters & Joiners of America,* 409 F.3d 1199 (9th Cir. 2005), the Ninth U.S. Circuit Court of Appeal held that peaceful bannering of a secondary employer, which did not involve patrolling or picketing, should not be enjoined because the NLRB was not likely to prevail on its unfair labor practice charges against the union. The court did not specifically hold that the banners are protected by the First Amendment, but noted that the union has a plausible argument that they are so protected. In this case, the court repeatedly emphasized that the conduct only involved bannering and handbilling, not picketing or patrolling. *But see Kentov v. Sheet Metal Workers Int'l Ass'n,* 418 F.3d 1259 (11th Cir. 2005) (union's conduct of carrying out mock funeral procession, including a union representative in a grim reaper costume and funeral music, was more like secondary picketing than peaceful handbilling and thus enjoinable).

4. Picketing for Recognition Under § 8(b)(7). Section 8(b)(7)(C) of the Act gives unions the right to picket for recognition for a reasonable period of time not to exceed thirty days. In addition, picketing for the purpose of seeking recognition is prohibited when either the employer has lawfully recognized another labor organization or when a valid election has been conducted during the preceding twelve months.

5. Injunctive Relief Available. When unlawful picketing occurs in violation of § 8(b)(4) or 8(b)(7), the Board must seek injunctive relief against such activity.

6. State Court Jurisdiction. State courts retain jurisdiction to enjoin strikes marked by violence and mass picketing that block ingress and egress.

7. Picketing of Private Homes. Picketing of private homes may be banned by state or local law. In *Frisby v. Schultz*, 487 U.S. 474 (1988), an ordinance banning only picketing "before or about the residence of any individual" was upheld.

K. Potential Anti-Trust Liability. A federal judge in California has held that a revenue-sharing agreement among supermarket chains signed to counter an anticipated strike and picketing by union workers was not protected from potential anti-trust liability by a nonstatutory exemption courts have extended to certain conduct by businesses involved in labor disputes. *See California v. Safeway, Inc.,* 371 F. Supp. 2d 1179 (C.D. Cal. 2005). In this case, the state of California filed a complaint alleging four supermarkets engaged in an unlawful combination and conspiracy in restraint of interstate trade and commerce in violation of the Sherman Act when they entered into a mutual strike assistance agreement (MSAA) in which they agreed, among other things, to share revenue in the event of a strike. The defendants claimed the MSAA is not subject to anti-trust challenge because it is related to their participation in multiemployer collective bargaining and thus falls within the nonstatutory labor exemption to the antitrust laws. The court held that the

MSAA was not sufficiently connected to the collective bargaining process and, thus, was not exempt from anti-trust laws.

IV. ADMINISTRATION OF THE COLLECTIVE BARGAINING AGREEMENT

A. Duty to Bargain During the Term of the Agreement: Waiver by Inaction. An employer must give prior notice and an opportunity to bargain before making a change in wages, hours, terms, or conditions of employment, unless it has reserved the right to make such changes without bargaining. However, if the union is put on notice but makes no attempt to bargain over the subject, the union may be held to have waived its right to bargain. *Hartmann Luggage Co*., 173 N.L.R.B. 1254 (1968); *United Press Int'l*, 289 N.L.R.B. 309 (1988).

An international union's failure to approve a midterm renegotiation of a contract does not relieve the local union of the obligation to sign the amended contract. In *NLRB v. Local 544, Graphic Communications Int'l Union*, 991 F.2d 1302 (7th Cir. 1993), the Seventh Circuit held that although midterm changes negotiated with and agreed to by a local union required international approval to validate the change, the local union's "dilatory behavior" in failing to submit the change to the international excused the need for the international's signature.

There is a continuing obligation to provide the union with requested information.

B. Handling Disputes During the Bargaining Relationship.

1. Union's Right to be Present at Employee Disciplinary Interviews (*Weingarten*). An employee in a disciplinary or investigatory interview may have a right to the presence of a representative under certain circumstances. Denial of that right may constitute an unfair labor practice. *NLRB v. J. Weingarten, Inc*., 420 U.S. 251 (1975). The right to a representative does not arise unless and until the employee requests the presence of the representative. *Montgomery Ward & Co*., 269 N.L.R.B. 904 (1984). The employer is not required to advise the employee of his or her right to a representative. In situations in which a *Weingarten* request has been made, the employer has three options: (a) discontinue the interview, remaining free to continue the investigation through other channels; (b) grant the request for a representative; or (c) allow the employee to choose between discontinuing the interview or continuing it without a representative (in which case, employee should be required to sign a written waiver of the right to a representative). In *Taracorp Industries*, 273 N.L.R.B. 221 (1984), the Board held that a *Weingarten* violation would not result in the remedy of reinstatement.

The Board has overturned its 2000 decision that the *Weingarten* right applies to nonunion employees as well as union employees and now holds that this right only applies to unionized employees. *See In re IBM Corp.,* 341 N.L.R.B. No. 148 (2004), *overruling In re Epilepsy Foundation of Northeast Ohio*, 331 N.L.R.B. No. 92 (2000).

In finding that *Weingarten* rights do not apply to non-union employees, the Board relied on the following policy considerations: (1) co-workers do not represent the interests of the entire workforce, as would a union representative in a unionized setting; (2) a co-worker in a non-union setting does not have the force of the bargaining unit behind him or her and cannot redress the "imbalance of power" between the employer and employees; (3) a co-worker in a non-union setting typically does not have the same skills as a union representative and may impede the investigatory process rather than facilitate it; and (4) the presence of a co-worker may compromise the confidentiality of the investigation.

The Fourth Circuit has held that, absent special circumstances, an employee or union, not the employer, has the right to select who will represent the employee during an employer's

investigation. As a result, the court concluded that the Board correctly found the employer guilty of an unfair labor practice when it denied the employee his choice of union representative in a disciplinary meeting. *See Anheuser-Busch, Inc. v. NLRB*, 338 F.3d 267 (4th Cir. 2003).

2. Arbitration vs. NLRB.

a. Employer's Consideration When Making Decisions. Employers should be mindful that arbitrators and the Board might apply different legal standards.

b. NLRB's Approach When Handling Charges. The Board applies three deferral policies when arbitration machinery is in place in a collective bargaining agreement.

- *Collyer Deferral (Collyer Insulated Wire,* 192 N.L.R.B. 837 (1971)). The Board should defer to existing grievance-arbitration procedures before either party's invocation of those procedures where: (a) the dispute arose within the confines of a long and productive collective bargaining relationship and there is no claim by the union that the employer is hostile to the employees' exercise of protected rights; (b) the employer credibly asserts its willingness to resort to arbitration under a clause providing for arbitration in a range of disputes that is broad enough to embrace the dispute before the Board; and (c) the contract and its meaning lie at the center of the dispute. The Board retains jurisdiction over the dispute pending acceptable resolution consistent with the *Spielberg* doctrine set forth below. In *Caritas Good Samaritan Medical Center,* 340 NLRB No. 6 (2003), the Board dismissed a complaint that a hospital that unilaterally changed health insurance benefits violated the NLRA, holding that deferral to arbitration was appropriate because the situation met the factors identified in *Collyer* and the CBA language was ambiguous.
- *Dubo Deferral (Dubo Mfg. Corp.,* 142 N.L.R.B. 431 (1963)). The Board should defer to the grievance-arbitration procedure where the dispute has already been submitted to that procedure. Thus a charging party may avoid deferral only by forgoing its use of the grievance-arbitration machinery. In other words, a charge will be subject to *Dubo* if the individual and the union are voluntarily pursuing the matter through arbitration machinery. The practical effect is that a smart union representative will file a grievance and then file a charge. The Board will then give the charging party the choice of forum in which it wishes to pursue the matter.
- *Spielberg Deferral* (*Spielberg Mfg. Co.,* 112 N.L.R.B. 1080 (1955)). The Board refuses to pursue unfair labor practices and will defer to the findings of an arbitrator where: (a) the arbitration proceedings were fair and regular; (b) all parties agreed to be bound; (c) the arbitrator's decision is not repugnant to purposes/policies of the Act; and (d) the issue involved in the unfair labor practice case were presented to and considered by the arbitrator, or at least, there is no evidence to the contrary. .

C. Obligations After Expiration of Agreement.

1. Continuation of Contract Terms. Upon expiration of the contract, the employer is obligated to maintain certain "core" employment terms from the agreement until a new agreement is reached or until impasse permits unilateral implementation of new terms.

2. Obligation to Arbitrate Grievances. The obligation may include an obligation to continue arbitration of grievances even after the contract expires. *Nolde Brothers, Inc. v. Bakery & Confectionary Workers Union*, 430 U.S. 988 (1977). In *Litton Financial Printing*

v. NLRB, 501 U.S. 190 (1991), the U.S. Supreme Court held that post-expiration arbitration is required only with respect to disputes arising under the contract. Such disputes would include disputes involving facts or occurrences prior to contract expiration; rights that accrued or vested under the previous contract; or when, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement.

In *Cincinnati Typographical Union No. 3 v. Gannett Satellite Info. Network*, 17 F.3d 906 (6th Cir. 1994), the Sixth Circuit Court of Appeals upheld an employer's refusal to submit to arbitration a disputed layoff that occurred after the contract expired. The court rejected the union's argument that the right not to be laid off was akin to vested rights to severance benefits. The court reasoned that severance accrues and vests over time, but the protections from layoff are strictly creatures of the collective bargaining agreement that do not extend beyond expiration. The court compared the layoff protections to a just cause provision that does not survive the expiration of a collective bargaining agreement.

3. Conditions of Employment That Do Not Survive Expiration of Agreement. To be enforceable, the following provisions normally require agreement by both parties since the statutory provisions in the Act only permit these obligations when specified by express terms of a collective bargaining agreement: (a) union security; (b) dues check-off; (c) arbitration; and (d) no strike (no lockout). *But see Joint Executive Bd. of Las Vegas v. NLRB,* 309 F.3d 578 (9th Cir. 2002) (the rule of labor law freezing the terms and conditions of employment until the parties negotiate to impasse – after which the employer may implement its current offer – applies to dues checkoff as well as wage and fringe benefits); *contra Office & Professional Employees Int'l Union v. Wood County Telephone Co.,* 408 F.3d 314 (7th Cir. 2005) (rejecting the Ninth Circuit's decision in *Las Vegas,* noting that consent for dues check-off expires with the collective bargaining agreement unless the employees give or reiterate permission individually). *See also Providence Journal Co. v. Providence Newspaper Guild*, 308 F.3d 129 (1st Cir. 2002) (requiring an employer to arbitrate whether a dues check off provision survived expiration of the collective bargaining agreement, holding that the expiration of a collective bargaining agreement does not necessarily extinguish a party's obligation to arbitrate grievances; noting that although employers do not have a statutory obligation to continue dues check off once collective bargaining agreements have expired, such obligations may be imposed by contract).

D. Handling of Grievances.

1. Duty to Accept Grievances. The employer has a duty to accept all grievances from the union. Refusal to accept grievances constitutes a refusal to bargain in violation of the act. *Imperial Court Hotel*, 322 N.L.R.B. 96 (1996).

2. Handling and Preserving Timeliness Issues and Other Issues of Procedural Arbitrability. The best tactic for an employer to follow when it believes a grievance is not timely or is otherwise not procedurally arbitrable is to accept the grievance and document to the union its belief that the matter is not grievable/arbitrable. This will permit an employer to preserve the issue for an arbitrator to resolve and avoid any arguments by the union that the employer waived its right to defend on this issue.

E. Handling of Arbitration Cases. Under any contract, issues will arise that were not contemplated during negotiations. Some employers believe utilizing arbitration to decide these issues is preferable, while other employers actively seek to avoid arbitration by authorizing grievance settlements to decide these issues.

1. Effect on Future Contract Negotiations. Logically, the prevailing party at an arbitration will not wish to change the favorable ruling of an arbitrator, but the rules

governing collective bargaining of mandatory subjects of bargaining still apply. Therefore the employer should not flatly refuse to bargain over an issue the arbitrator has resolved when that issue is a mandatory subject of bargaining.

2. Education of Supervisors. Supervisors should understand the employer's goals in grievance handling. Training may be necessary to ensure that supervisors are not conceding issues that may become important down the road.

3. Arbitrator's Decision. Arbitrators' decisions are often based on the arbitrator's personal concept of fairness. They need only "draw their essence from" the contract. *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Thus, arbitration awards often lead to "antiemployer" results such as reinstatement of an employee who assaulted two fellow employees based upon psychiatric testimony that the individual was temporarily insane. *See E.I. DuPont de Nemours & Co. v. Grasselli Employees Independent Ass'n.*, 118 L.R.R.M. 3312 (N.D. Ind. 1985), *rev'd*, 790 F.2d 611 (7th Cir. 1986). The Eighth Circuit Court of Appeals held that an arbitrator acted within his authority in reinstating an employee who was discharged for fighting in *Trailmobile Trailor L.L.C. v. International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers*, 223 F.3d 744 (8th Cir. 2000). In *Trailmobile*, the court rejected the employer's argument that the arbitrator ignored the broad language of the management rights clause, which gave the employer "sole discretion" in employment decisions, and held that the arbitrator acted within his authority in reinstating the employee.

Arbitrators' decisions can be overturned through court action if the arbitrator exceeds his or her authority in the contract, engages in misconduct, or the arbitrator's decision violates an explicit public policy. *Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987). For example, an arbitrator's decision to reinstate an employee who was discharged for drug use was overturned by the Fifth Circuit in *Gulf Coast Indus. Workers Union v. Exxon Co.*, 70 F.3d 847 (5th Cir. 1995). In *Gulf Coast*, the court found that the arbitrator ignored the positive drug test results submitted by the employer, finding that the results were hearsay. In another case, *Houston Lighting & Power Co. v. IBEW Local 66*, 71 F.3d 179 (5th Cir. 1995), an arbitrator re-determined a disputed job rating for an employee. The Fifth Circuit refused to enforce the award, holding that the only remedy available was to remand the matter to the company so that the company could make a re-determination of the employee's qualifications under a valid process. According to the court, by performing his own re-evaluation, the arbitrator went beyond the scope of his authority, and beyond the parties' contractual agreement. *See also Armco Employees Independent Federation, Inc. v. AK Steel Corp.,* 149 Fed. Appx. 347 (6th Cir. 2005) (arbitrator exceeded his authority in awarding monetary relief "to those apprentices who did not fulfill the grievance requirements" under the CBA).

F. Duty of Fair Representation.

1. Definition of Duty of Fair Representation. There is a judicially created duty to fairly represent the employees for whom the union acts as exclusive collective bargaining agent under the NLRA and the Railway Labor Act. The U.S. Supreme Court holds that conduct toward a member of the bargaining unit that is arbitrary, discriminatory, or in bad faith breaches the duty. *Vaca v. Sipes*, 386 U.S. 171 (1967). More than mere errors of judgment are required to breach this duty. The union is permitted a "wide range of reasonableness." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). The federal courts struggle with finer definitions of the standard. Some courts hold that perfunctory treatment breaches the duty under certain circumstances. Other courts find a breach in the presence of mere negligence by the union. *But see Steel Workers v. Rawson*, 495 U.S. 362, 372-73 (1990) (holding that mere negligence does not state a claim for breach of duty of fair representation).

A union may violate its duty of fair representation by encouraging workers to join a strike when it knows they are likely to be fired for doing so. *Alicea v. Suffield Poultry, Inc.*, 902 F.2d 125 (1st Cir. 1990).

2. Forums for Enforcement. Union breaches of the duty of fair representation may be actionable under the Act both before the Board and in a lawsuit filed under § 301 of the Act. Generally, the action is against both the union and the employer since it is usually the employer who holds the key to the relief sought, *i.e.*, back pay and reinstatement. The U.S. Supreme Court has held that employees are entitled to a jury trial under § 301. *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558 (1990).

3. Prerequisites for Bringing Action. When the complaint involves a breach of contract, the employee asserting breach of contract must first attempt to use the grievance procedure to afford the union an opportunity to act on his or her behalf. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). In certain situations, an employee need not exhaust contractual remedies prior to filing an unfair labor practice charge or a 301 action where the conduct of the employer amounts to a repudiation of contractual procedures. The U.S. Supreme Court has held that if a union breaches its duty of fair representation in the grievance process, the employee may maintain an action against an employer for breach of contract even though the employer acted in good faith throughout the grievance arbitration proceeding. *See DelCostello v. IBT*, 462 U.S. 151 (1983).

The U.S. Supreme Court has held that when a union constitution or bylaws provide for an internal review process of complaints by members, these procedures must be exhausted before a § 301 suit can be filed. *See Clayton v. Automobile Workers*, 451 U.S. 679 (1981). At least three factors should be considered in determining whether internal union procedures need to be exhausted: (a) Are the union officials so hostile to the employee that the employee could not hope to obtain a fair hearing? (b) Are the internal union appeals procedures inadequate to reactivate the employee's grievance or to award the full relief sought under § 301? (c) Would the exhaustion of internal procedures unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of the claim?

There is a six-month statute of limitations for filing suit under § 301 for breach of the duty of fair representation and "hybrid" breach of contract/duty of fair representation claims. This is the same limitation period applicable to unfair labor practice charges. *DelCostello v. IBT*, 462 U.S. 151 (1983).

4. Remedies Vary With The Forum. An employee who prevails before the Board may secure: (a) a cease and desist order; (b) processing of the grievance, if applicable; (c) make whole relief; and (d) possible apportionment of make whole relief between employer and union, if jointly responsible. The Board has no authority to order the employer to reinstate the employee or give compensation where the charge is not filed against the employer or the employer's conduct does not amount to an unfair labor practice. Under these circumstances, the Board has required the union to make the employee whole until the union fulfilled its duty or the employee found substantially equivalent employment elsewhere, whichever first occurred.

An employee who prevails in a court action may secure damages, which are normally apportioned between the union and the employer based upon responsibility. Awards have also included: (a) back pay; (b) future losses; and (c) compensatory damages. Attorney fees may also be awarded but the issue has not been resolved. Courts permit injunctive and other equitable relief including compelling arbitration. The courts disagree over awarding damages for mental distress. Punitive damages are not recoverable against a union but may be against the employer.

V. ENDING THE EMPLOYER-UNION RELATIONSHIP

A. Union Disclaimer. Unions in certain situations (for example, as part of a strike or unfair labor practice settlement) will execute a written disclaimer of continued interest of representation.

B. Loss of Majority Status: Presumption of Majority Status. Once certified, a union enjoys a presumption of continued majority status, which becomes a rebuttable presumption one year after certification. *Terrell Machine Co.*, 173 N.L.R.B. 1480 (1969), *enf'd*, 427 F.2d 1088 (4th Cir. 1970). The NLRB recently revised its legal standard for determining the circumstances in which an employer may lawfully withdraw recognition from a union representing its employees.

In *Levitz Furniture Co. of the Pacific, Inc.*, 333 NLRB No. 105 (2001), the Board held that "[A]n employer may rebut the continuing majority status, and unilaterally withdraw recognition, only on a showing that the union has, *in fact*, lost the support of a majority of the employees in the bargaining unit." (Emphasis added.) In so holding, the Board expressly overruled a long line of decisions allowing employers to withdraw recognition based upon a "good-faith doubt" (defined to mean "uncertainty or disbelief") as to the union's continued majority status.

Under the NLRB's new standard, an employer who withdraws recognition from a union based even upon objective evidence that the union has lost employee support (*e.g.*, a petition signed by the vast majority of unit employees), does so "at its peril." *Levitz*, *supra*. If the union contests the withdrawal by filing an unfair labor practice charge, the employer will be required to prove to the Board, by a preponderance of the evidence, that its conclusion that the union lacked majority support was, *in fact*, correct. For a variety of reasons (including the burden of questioning each and every unit employee under oath at a Board hearing, the likelihood that certain employees may testify falsely or change their minds in the intervening time between the employer's action and the hearing on the charge, and the possibility that the union may attempt to impeach witnesses or demonstrate that the employer coerced its employees into denying union support), this may be a very difficult showing for an employer. In practical terms, the Board has made it extremely burdensome and risky for an employer to unilaterally withdraw recognition from an incumbent union.

An employer may not lawfully withdraw recognition from a union where it has committed unfair labor practices that are likely to affect the union's status, cause employee disaffection or improperly affect the bargaining relationship itself. *Garden Ridge Management, Inc.,* 347 N.L.R.B. No. 13 (2006). However, where the unfair labor practice does not involve a general refusal to recognize and bargain with the union, "there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support." *Garden Ridge Management* (Board could not conclude that employer's refusal to schedule additional bargaining sessions had a meaningful impact on employee disaffection.)

C. Employee Resignations from the Union and Cancellation of Dues Check-Off. A union may not restrict the right of its members to resign, even in a non-right-to-work state. *PatternMakers' League v. NLRB*, 473 U.S. 95 (1985). Generally speaking, an employee may resign from the union at any time by giving the union proper written notification of the resignation. An employee who resigns union membership is not subject to union fines or assessments for such conduct as crossing a union's picket line.

In some situations, a resignation of union membership may not relieve the employer from the contractual obligation to check-off the employee's union dues. For example, in states permitting union security clauses, an employee's resignation from union membership may not relieve the employee's financial obligations to the union as a financial core member. However, when the payment of union dues is considered to be a "quid pro quo" for union membership, the Board holds that resignation of union membership automatically constitutes a revocation of check-off authorization. *See ASARCO*, 246 N.L.R.B. 878 (1979); *Carpenters Council*, 243 N.L.R.B. 147

(1979). The Board does not always find that union membership dues are a "quid pro quo" for union membership. *See Frito-Lay, Inc*., 243 N.L.R.B. 137 (1979).

The Board generally finds that resignation from the union ends the check-off obligation where there is no union security clause. *IBEW Local 2088 (Lockheed Space Operations)*, 302 N.L.R.B. 322 (1991). According to the Board:

> Explicit language within the checkoff authorization clearly setting forth an obligation to pay dues even in the absence of union membership will be required to establish that the employee has bound himself or herself to pay the dues even after resignation of membership. If an authorization contains such language, dues may properly continue to be deducted from the employee's earnings and turned over to the union during the entire agreed-upon period of irrevocability, even if the employee states he or she has had a change of heart and wants to revoke the authorization.

IBEW and David May, 302 N.L.R.B. No. 49 (1991).

D. Employer Involvement In Employee Revocation of Union Authorization. An employer must be extremely careful soliciting employees to resign union membership or revoke authorization cards. Generally, an employer may inform employees of their rights, and may respond to questions posed by individual employees; however, an employer may not lawfully solicit employees to resign union membership or cancel check-off authorizations and may run risks if it responds to queries from individual employees with answers directed to the entire group. *See Heck's, Inc*., 293 N.L.R.B. 1111 (1989).

E. Types of NLRB Decertification Petitions.

1. Employer-Filed Representation Petition (RM). If the employer ceases bargaining with the union altogether, it risks violating § 8(a)(5) and may incur liability to make employees whole for any unilateral changes. A safer course, therefore, is to file an "RM" petition. Simultaneous with the announcement of its more stringent standard to be applied in cases of unilateral withdrawal of recognition, the Board in *Levitz* also implemented a more lenient standard for RM petitions. Whereas the Board previously would consider such a petition only on a showing that the employer "had a good-faith reasonable belief, grounded in objective considerations, that the union no longer enjoyed the support of a majority of the unit employees," the new standard requires an employer to demonstrate only a good-faith "uncertainty" – as opposed to an affirmative belief – as to the union's continued majority status. *Levitz*, *supra*. Thus, even if an employer is presented with conflicting evidence regarding the union's continuing status as a majority representative, the employer may nevertheless petition for an election to oust the union based on its good-faith uncertainty.

2. Employee-Filed Decertification Petition (RD). Thirty percent of the employees in the unit can petition to decertify a collective bargaining representative. Recent decertification election results show that unions lose approximately three-quarters of such decertification elections. Petitions seeking to decertify a union must be filed between sixty and ninety days prior to the expiration date of a contract (90-120 in the health care field.)

The Board holds that negotiations must go on even though a decertification petition has been filed. *Dresser Indus*., 264 N.L.R.B. 1088 (1982). *Cf. Indiana Cabinet Co*., 275 N.L.R.B. 1209 (1985), *enf'd*, 893 F.2d 493 (2d Cir. 1990).

F. Employer Sponsorship of Decertification Petitions. An employer cannot sponsor a decertification petition or permit its agents (supervisors) to initiate or encourage the filing of a decertification petition. In *Tyson Foods, Inc*., 311 N.L.R.B. 552 (1993), the Board ordered the employer to recognize and bargain with a union based on the Board's finding that the employer

had unlawfully assisted an employee effort to decertify the union by supporting the activities of an employee who was the primary force in the decertification campaign and then withdrawing its recognition of the union, although the decertification election was never held.

The Board holds that an employer has the right to lawfully inform employees of their ability to revoke union authorization cards, even where employees have not solicited such information, where the employer does not attempt to find out whether employees will avail themselves of this right and where the employer does not offer any assistance or otherwise create a situation where employees tend to feel peril in refraining from such action. *R.L. White Co*., 262 N.L.R.B. 575 (1982).

The safest approach is to refer the employee to the Board. Recognize, however, that the Board is not particularly sympathetic to employees desiring to decertify their union, and the employee may be "worn out" by the Board's processes. There are many technical rules that must be followed and the employee may lose interest prior to exhausting all of those requirements.

The Board has also approved giving employees advice on how to resign from a union or giving a list of employees' names and addresses to an attorney representing employees who wish to decertify a union. *See Continental Nut Co*., 195 N.L.R.B. 841 (1972); *Consolidated Rebuilders, Inc*., 171 N.L.R.B. 1415 (1968).

G. Repudiation of an 8(f) Prehire Agreement in the Construction Industry. In *Deklewa and Sons,* 282 NLRB 1375 (1987), *enf'd sub nom, Int'l Assoc. of Bridge, Structural and Ornamental Iron Workers v. NLRB (Deklewa),* 843 F.2d 770 (3d Cir. 1988), the Board announced a new position on the issue of when a party to a § 8(f) contract may repudiate that agreement. Prior to *Deklewa*, the Board had maintained that either party to a prehire agreement could repudiate that agreement at any time before the union obtained majority status in the appropriate bargaining unit. When the union obtained majority status, which was known as "conversion," the union enjoyed full status as a § 9(a) bargaining representative. However, the *Deklewa* rule provides that § 8(f) imposes an obligation on the parties to a prehire agreement to comply with it. That obligation is enforceable under §§ 8(a)(5) and 8(b)(3) unless the covered employees vote to reject the union as their bargaining representative in a Board conducted election. *See, e.g., C.E.K. Indus. Mech. Contrs. v. NLRB,* 921 F.2d 350 (1st Cir. 1990).

After expiration of the § 8(f) agreement, however, the signatory union, unlike a full § 9(a) representative, is not entitled to a presumption of majority status. At that point, either party could repudiate the § 8(f) relationship. *Id*.

Construction industry employers may repudiate a § 8(f) prehire agreement where the agreement has expired, provided the employer has not voluntarily recognized the union on the basis of majority support. *San Antonio Control Sys., Inc*., 290 N.L.R.B. 786 (1988).

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Supreme Court Limits Exposure to Discriminatory Pay Claims under Title VII

The Supreme Court has held that an employer's decision setting an employee's wages, and not the mere issuance of a paycheck based on that decision, triggers Title VII's deadline to file an administrative charge based on allegedly discriminatory pay. *Ledbetter v. Goodyear Tire & Tube Co*., 127 S.Ct. 2162 (May 29, 2007). In *Ledbetter*, the plaintiff worked for Goodyear from 1979 until 1998. For most of that time period, plaintiff's salary was determined annually and was based on her supervisor's ranking of her performance. Plaintiff's performance reviews typically placed her near the bottom of the rankings with her coworkers, and she consequently received small salary increases. When the plaintiff retired, her small annual increases had resulted in a large gap between her compensation and that of her male coworkers.

Plaintiff filed a charge of discrimination in 1998, and filed a lawsuit in 1999. At trial, plaintiff was awarded $360,000, plus attorneys' fees and costs. The Court of Appeals reversed, concluding that the plaintiff's pay at the time she filed her charge of discrimination was the result of long-past decisions that could not be challenged outside of Title VII's charge-filing period.

The Supreme Court affirmed, and determined that a pay-setting decision is similar to a termination or demotion and is a discrete act forming the basis of a Title VII claim and thus triggers the period in which to file a charge. The Court rejected plaintiff's argument that the issuance of a paycheck based on an allegedly discriminatory pay decision made outside of the charging period constitutes a continuing violation of Title VII. The Court applied the principle established in *United Airlines v. Evans* (1977) and *Delaware State College v. Ricks* (1980) "that current effects alone cannot breathe life into prior, uncharged discrimination."

The Court rejected the plaintiff's reading of *Bazemore v. Friday* (1986) as creating a "paycheck accrual rule" under which each new paycheck impacted by a past discriminatory decision always triggers a new charging period. Instead, the Court construed *Bazemore* as creating a new charging period only when an employer actually applies a discriminatory pay structure within the 180-day period. The Court essentially reconciled its decision with *Bazemore* by distinguishing between the continued application of a facially-discriminatory policy (which triggers a new charging period) and the non-discriminatory application of a facially-neutral policy regarding pay raises (which does not trigger a new charging period, even if the employee's rate of pay is lower because of a past discriminatory decision outside of the charging period).

Whistleblowers Face Harder Time Bring False Claims Act Cases

The False Claims Act ("FCA") authorizes private persons to file "qui tam" actions relating to contractor fraud on behalf of the Government and to be awarded part of any financial recovery obtained. However, unless the individual is an "original source" of the information underlying the allegations, such a relator cannot recover on publicly disclosed allegations. The individual must have direct and independent knowledge of information giving rise to the allegations and provide that information voluntarily to the Government before suit is filed.

The Supreme Court has decided that relators □ private parties who bring FCA lawsuits after complaining to the Government about alleged contractor fraud □ must be an "original source" of information about the alleged contractor fraud for the lawsuit actually brought, and not just for the initial complaint to the Government. *Rockwell International Corp. v. United States*, 127 S.Ct. 1397 (March 27, 2007).

In *Rockwell*, the employee reported Rockwell's alleged wrongdoing to the Federal Bureau of Investigation, which commenced an investigation into the alleged fraud. The employee began his own qui tam action against Rockwell. Although the employee was the original source of the fraud allegations, the case eventually brought by the Government, reflected in an amended complaint, proceeded on a different theory. The majority opinion states that jurisdiction depends upon "the state of things at the time the action is brought," *i.e.*, the time of the amended complaint, and not at the time of [the employee's] original complaint." Since it did not appear that the employee was an original source for the allegations of the amended complaint, there was no jurisdiction to entertain his FCA claim and he was not entitled to share in any recovery obtained by the Government.

Americans with Disabilities Act ("ADA") and Family and Medical Leave Act ("FMLA")

Counting Prior Service Towards FMLA Eligibility

Holding an earlier period of employment could be counted to satisfy the FMLA's 12-month eligibility requirement, the First Circuit Court of Appeals reversed a grant of summary judgment for an employer. *Rucker v. Lee Holding Co., d/b/a Lee Auto Malls*, 471 F.3d 6 (1st Cir. 2006). A car salesman returned to work at the dealership after a lapse of five years. Seven months after rejoining the company, and after almost two months of intermittent absences from the job due to a back injury, the company terminated the salesman's employment. The dealership argued the FMLA claim should fail because the salesman had not worked for the company for 12 months and, therefore, was not eligible for FMLA leave. The Court thought otherwise, ruling periods of employment need not be consecutive and his employment at the dealership over five years earlier should have been counted in determining FMLA eligibility.

Disclosure of Symptoms Leading to Cancer Diagnosis Constitutes Sufficient FMLA Notice

Holding an employee who disclosed a series of health problems to his employer over a four-month period provided sufficient notice of a serious health condition protected by the FMLA, the Seventh Circuit Court of Appeals reversed a grant of summary judgment for an employer. *Burnett v. LFW Inc., d/b/a The Habitat Co*., 472 F.3d 471 (7th Cir. 2006). The employee was not diagnosed with cancer until after he was terminated but, over a four-month period, told his employer that he was having health problems that required medical attention; turned down a transfer to a position that would have restricted his rest room access due to his "weak bladder;" presented his manager with a copy of a doctor's order for blood work to justify

some of the time off; explained he had a high PSA (prostate-specific antigen) and high cholesterol; had upcoming doctor's appointments; and needed leave to undergo a biopsy. The company disciplined the employee, in part, for unauthorized absences and terminated the employee for insubordination when the employee left work after telling his manager he felt sick and wanted to go home.

UPS Violated ADA By Barring Deaf Workers from Driving Jobs

Holding the ADA and California's Fair Employment and Housing Act prohibited UPS from applying a U.S. Department of Transportation hearing standard to deaf workers who were not covered by the DOT standard, the Ninth Circuit Court of Appeals affirmed a trial verdict against UPS. *Bates v. United Parcel Serv. Inc.*, 465 F.3d 1069 (9th Cir. 2006). The Court found that UPS failed to carry its burden of showing that its voluntary use of the DOT hearing standard for jobs driving the package-car vehicles was job-related and consistent with business necessity. The Court also found that UPS failed to present evidence showing either that substantially all deaf drivers present a higher risk of accidents than non-deaf drivers or that there are no practical criteria for determining which deaf drivers present a heightened risk.

Prorating "Production Bonus" for Employee on FMLA Leave Allowed

Holding an employer did not violate the FMLA when it reduced a former employee's annual bonus payment based on the employee's eight-week leave under the FMLA, the Third Circuit Court of Appeals affirmed summary judgment for the employer. *Sommer v. Vanguard Group*, 461 F.3d 397 (3d Cir. 2006). The employer's bonus rewarded employees for meeting an annual goal for hours worked. The bonus program defined "hours worked" as the actual hours for which an employee is paid or entitled to be paid by the employer for the performance of duties or for vacation, holidays or sick time. However, the policy explicitly excluded from the definition of "hours worked" leaves of absence under the employer's short-term or long-term disability programs. The employer also had a practice of prorating the bonus based on absences due to workers' compensation and personal leave. The Court reasoned that the bonus was a production bonus rather than an absence-of-occurrence bonus because employees had to make a positive effort — i.e., meet the annual hours-based production requirement.

Morbid Obesity Not a Physical Impairment Under ADA

Affirming summary judgment, the Sixth Circuit Court of Appeals held the EEOC failed to show an employee's morbid obesity was an impairment and, therefore, failed to establish an ADA violation. *EEOC v. Watkins Motor Lines*, 463 F.3d 436 (6th Cir. 2006). The employee, a 405-pound dockworker, sustained an injury when a rung on a ladder he was climbing broke. He took a leave of absence due to the injuries and was later terminated after he failed to produce sufficient medical documentation to clear him to return to work. Citing EEOC regulations, the Court determined that physical characteristics, such as obesity, that are not the result of a physiological disorder are not considered "impairments" for the purposes of determining either actual or perceived disability under the ADA. The Court concluded that, to be an ADA impairment, a person's obesity, even morbid obesity, must be the result of a physiological condition.

Trucker's FMLA Claim Against Successor Employer May Proceed to Trial

In an issue of first impression, the Sixth Circuit Court of Appeals held a truck driver was an FMLA-eligible employee, even though he worked for the employer for fewer than the law's required 12 months, because the employer was the successor-in-interest to the trucker's previous employer. *Cobb v. Contract Transp. Inc.*, 452 F.3d 543 (6th Cir. 2006). Relying on the language of FMLA and its implementing regulations, the Court found a congressional intent to adopt the doctrine of successor liability developed in federal labor law cases. The FMLA expressly defines "employer" to include "successors in interest," the Court held, and its implementing regulations adopt the successor-in-interest test from case law applying Title VII of the 1964 Civil Rights Act and the Vietnam Era Veterans' Adjustment Act. Because the merger or transfer of assets is not a precondition to successor liability in the context of labor law or Title VII, the Court reasoned it is not a precondition for liability in the FMLA context.

ADA Claim By Epileptic Heavy-Equipment Operator Must Go To Trial

Reversing the district court's grant of summary judgment, the Ninth Circuit Court of Appeals held a trial was necessary to determine whether a county fired the employee because of his disability, in violation of the ADA. *Dark v. Curry County Road Dep't*, 451 F.3d 1078 (9th Cir. 2006). The Court also held a trial was necessary to determine whether a reasonable accommodation, such as temporary reassignment or medical leave, would have allowed the employee to keep his job without posing a "direct threat." The employee, who had experienced an aura but nevertheless worked without informing anyone of the possibility of a seizure, suffered a seizure and fell unconscious while driving a truck. The county's doctor concluded the employee was limited in his ability to do his job, and the county sent a letter stating it was terminating the employee because he could not perform the essential functions of his position, and his continued employment posed a threat to the safety of others. The county board of commissioners affirmed the decision, reasoning that the employee had acted irresponsibly and with total disregard to the safety of himself and others. Reviewing these facts, the Court found that it was unclear whether the county's decision was based on the employee's misconduct or his fitness for duty and, if the latter, a trial was needed to determine it that was accurate.

California ☐ Public Policy Protects Employees Who Complain of Workplace Violence

The California Court of Appeals, reversing the dismissal of plaintiff's complaint, has ruled that an employee who claimed he was terminated after complaining about a co-workers threat of violence stated a claim for wrongful termination in violation of public policy. *Franklin v. The Monadnock Co.*, 151 Cal. App. 4th (Cal. Ct. App. 2007). The court also ruled that employers must take reasonable steps to address credible threats of violence and that the plaintiff's complaint about his co-worker served the public interest in promoting workplace safety.

In *Franklin*, the plaintiff alleged that his co-worker threatened to have him and three other employees killed. He complained to the employer's human resources department, but the employer did not respond to his complaint. About one week later, the co-worker assaulted the

plaintiff with a screwdriver. The plaintiff then filed a complaint with the police, and was later discharged. In his complaint, plaintiff alleged that in violation of public policy he had been discharged because of his complaints to his employer and the police. The employer moved to dismiss the complaint for failure to state a claim, arguing that the plaintiff's complaint to the employer did not involve a fundamental public policy and did not inure to the benefit of the public.

The Court of Appeals rejected the employer's arguments. The appellate court found that California Labor Code § 6400, *et seq*. generally requires employers to provide a safe and healthful place of employment and to take adequate measures to ensure employees' health and safety. California Code of Civil Procedure § 527.8 provides employers with an injunctive remedy to address unlawful violence or a credible threat of violence by any individual, including by any employee against a co-worker in the workplace. Reading the statutes together, the court found that they established a public policy requiring employers to provide a safe workplace, including a requirement that employers take reasonable steps to address credible threats of violence in the workplace. The court rule that a credible threat is one that an employee reasonably believes will be carried out, so as to cause the employee to fear for his or her safety or that of his family.

The court also found that the plaintiff's complaint about his co-worker's threats and subsequent police report served the public interest in promoting workplace safety, the interest in deterring workplace crime, and the interests of innocent co-workers who could have suffered harm. The court held that employees should be free to bring, and not be terminated for bringing, credible threats of violence to the attention of the employer and police so that suspected criminal conduct or foreseeable violence can be prevented.

EEOC – Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities

[redacted]	NOTICE	Number 915.002
EEOC		
[redacted]		Date 5/23/07

SUBJECT: Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities

PURPOSE: This document provides guidance regarding unlawful disparate treatment under the federal EEO laws of workers with caregiving responsibilities .

EFFECTIVE DATE: Upon receipt.

EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment, § a(5), this Notice will remain in effect until rescinded or superseded.

ORIGINATOR: Title VII/EPA/ADEA Division, Office of Legal Counsel

SUBJECT MATTER: File after Section 615 of Volume II of the Compliance Manual.

Naomi C. Earp
Chair

ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES

Table of Contents

Although the federal EEO laws do not prohibit discrimination against caregivers per se, there are circumstances in which discrimination against caregivers might constitute unlawful disparate treatment. The purpose of this document is to assist investigators, employees, and employers in assessing whether a particular employment decision affecting a caregiver might unlawfully discriminate on the basis of prohibited characteristics under Title VII of the Civil Rights Act of 1964 or the Americans with Disabilities Act of 1990. This document is not intended to create a new protected category but rather to illustrate circumstances in which stereotyping or other

forms of disparate treatment may violate Title VII or the prohibition under the ADA against discrimination based on a worker's association with an individual with a disability. An employer may also have specific obligations towards caregivers under other federal statutes, such as the Family and Medical Leave Act, or under state or local laws.[1]

I. *BACKGROUND AND INTRODUCTION*

A. *Caregiving Responsibilities of Workers*

The prohibition against sex discrimination under Title VII has made it easier for women to enter the labor force. Since Congress enacted Title VII, the proportion of women who work outside the home has significantly increased,[2] and women now comprise nearly half of the U.S. labor force.[3] The rise has been most dramatic for mothers of young children, who are almost twice as likely to be employed today as were their counterparts 30 years ago.[4] The total amount of time that couples with children spend working also has increased.[5] Income from women's employment is important to the economic security of many families, particularly among lower-paid workers, and accounts for over one-third of the income in families where both parents work.[6] Despite these changes, women continue to be most families' primary caregivers.[7]

Of course, workers' caregiving responsibilities are not limited to childcare, and include many other forms of caregiving. An increasing proportion of caregiving goes to the elderly, and this trend will likely continue as the Baby Boomer population ages.[8] As with childcare, women are primarily responsible for caring for society's elderly, including care of parents, in-laws, and spouses.[9] Unlike childcare, however, eldercare responsibilities generally increase over time as the person cared for ages, and eldercare can be much less predictable than childcare because of health crises that typically arise.[10] As eldercare becomes more common, workers in the "sandwich generation," those between the ages of 30 and 60, are more likely to face work responsibilities alongside both childcare and eldercare responsibilities.[11]

Caring for individuals with disabilities – including care of adult children, spouses, or parents – is also a common responsibility of workers.[12] According to the most recent U.S. census, nearly a third of families have at least one family member with a disability, and about one in ten families with children under 18 years of age includes a child with a disability.[13] Most men and women who provide care to relatives or other individuals with a disability are employed.[14]

While caregiving responsibilities disproportionately affect working women generally, their effects may be even more pronounced among some women of color, particularly African American women,[15] who have a long history of working outside the home.[16] African American mothers with young children are more likely to be employed than other women raising young children,[17] and both African American and Hispanic women are more likely to be raising children in a single-parent household than are White or Asian American women.[18] Women of color also may devote more time to caring for extended family members, including both grandchildren[19] and elderly relatives,[20] than do their White counterparts.

Although women are still responsible for a disproportionate share of family caregiving, men's role has increased. Between 1965 and 2003, the amount of time that men spent on childcare nearly tripled, and men spent more than twice as long performing household chores in 2003 as they did in 1965.[21] Working mothers are also increasingly relying on fathers as primary childcare providers.[22]

B. *Work-Family Conflicts*

As more mothers have entered the labor force, families have increasingly faced conflicts between work and family responsibilities, sometimes resulting in a "maternal wall" that limits the employment opportunities of workers with caregiving responsibilities.[23] These conflicts are perhaps felt most profoundly by lower-paid workers,[24] who are disproportionately people of color.[25] Unable to afford to hire a childcare provider, many couples "tag team" by working opposite shifts and taking turns caring for their children. In comparison to professionals, lower-paid workers tend to have much less control over their schedules and are more likely to face inflexible employer policies, such as mandatory overtime.[26] Family crises can sometimes lead to discipline or even discharge when a worker violates an employer policy in order to address caregiving responsibilities.[27]

The impact of work-family conflicts also extends to professional workers, contributing to the maternal wall or "glass ceiling" that prevents many women from advancing in their careers. As a recent EEOC report reflects, even though women constitute about half of the labor force, they are a much smaller proportion of managers and officials.[28] The disparity is greatest at the highest levels in the business world, with women accounting for only 1.4% of Fortune 500 CEOs.[29] Thus, one of the recommendations made by the federal Glass Ceiling Commission in 1995 was for organizations to adopt policies that allow workers to balance work and family responsibilities throughout their careers.[30]

Individuals with caregiving responsibilities also may encounter the maternal wall through employer stereotyping. Writing for the Supreme Court in 2003, Chief Justice Rehnquist noted that "the faultline between work and family [is] precisely where sex-based overgeneralization has been and remains strongest."[31] Sex-based stereotyping about caregiving responsibilities is not limited to childcare and includes other forms of caregiving, such as care of a sick parent or spouse.[32] Thus, women with caregiving responsibilities may be perceived as more committed to caregiving than to their jobs and as less competent than other workers, regardless of how their caregiving responsibilities actually impact their work.[33] Male caregivers may face the mirror image stereotype: that men are poorly suited to caregiving. As a result, men may be denied parental leave or other benefits routinely afforded their female counterparts.[34] Racial and ethnic stereotypes may further limit employment opportunities for people of color.[35]

Employment decisions based on such stereotypes violate the federal antidiscrimination statutes,[36]even when an employer acts upon such stereotypes unconsciously or reflexively.[37] As the Supreme Court has explained, "[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they match the stereotype associated with their group."[38]Thus, for example, employment decisions based on stereotypes about working mothers are unlawful because "the antidiscrimination laws entitle individuals to be evaluated as individuals rather than as members of groups having certain average characteristics."[39]

Although some employment decisions that adversely affect caregivers may not constitute unlawful discrimination based on sex or another protected characteristic, the Commission strongly encourages employers to adopt best practices to make it easier for all workers, whether male or female, to balance work and personal responsibilities. There is substantial evidence that workplace flexibility enhances employee satisfaction and job performance.[40] Thus, employers

can benefit by adopting such flexible workplace polices[41] by, for example, saving millions of dollars in retention costs.[42]

II. *UNLAWFUL DISPARATE TREATMENT OF CAREGIVERS*

This section illustrates various circumstances under which discrimination against a worker with caregiving responsibilities constitutes unlawful disparate treatment under Title VII or the ADA. Part A discusses sex-based disparate treatment of female caregivers, focusing on sex-based stereotypes. Part B discusses stereotyping and other disparate treatment of pregnant workers. Part C discusses sex-based disparate treatment of male caregivers, such as the denial of childcare leave that is available to female workers. Part D discusses disparate treatment of women of color who have caregiving responsibilities. Part E discusses disparate treatment of a worker with caregiving responsibilities for an individual with a disability, such as a child or a parent. Finally, part F discusses harassment resulting in a hostile work environment for a worker with caregiving responsibilities.

A. *Sex-based Disparate Treatment of Female Caregivers*

1. *Analysis of Evidence*

Intentional sex discrimination against workers with caregiving responsibilities can be proven using any of the types of evidence used in other sex discrimination cases. As with any other charge, investigators faced with a charge alleging sex-based disparate treatment of female caregivers should examine the totality of the evidence to determine whether the particular challenged action was unlawfully discriminatory. All evidence should be examined in context. The presence or absence of any particular kind of evidence is not dispositive. For example, while comparative evidence is often useful, it is not necessary to establish a violation.[43] There may be evidence of comments by officials about the reliability of working mothers or evidence that, despite the absence of a decline in work performance, women were subjected to less favorable treatment after they had a baby. It is essential that there be evidence that the adverse action taken against the caregiver was based on sex.

Relevant evidence in charges alleging disparate treatment of female caregivers may include, but is not limited to, any of the following:

- Whether the respondent asked female applicants, but not male applicants, whether they were married or had young children, or about their childcare and other caregiving responsibilities;
- Whether decisionmakers or other officials made stereotypical or derogatory comments about pregnant workers or about working mothers or other female caregivers;[44]
- Whether the respondent began subjecting the charging party or other women to less favorable treatment soon after it became aware that they were pregnant;[45]
- Whether, despite the absence of a decline in work performance, the respondent began subjecting the charging party or other women to less favorable treatment after they assumed caregiving responsibilities;
- Whether female workers without children or other caregiving responsibilities received more favorable treatment than female caregivers based upon stereotypes of mothers or other female caregivers;
- Whether the respondent steered or assigned women with caregiving responsibilities to less prestigious or lower-paid positions;
- Whether male workers with caregiving responsibilities received more favorable treatment than female workers;[46]
- Whether statistical evidence shows disparate treatment against pregnant workers or female caregivers;[47]
- Whether respondent deviated from workplace policy when it took the challenged action;
- Whether the respondent's asserted reason for the challenged action is credible.[48]

2. *Unlawful Disparate Treatment of Female Caregivers as Compared with Male Caregivers*

Employment decisions that discriminate against workers with caregiving responsibilities are prohibited by Title VII if they are based on sex or another protected characteristic, regardless of whether the employer discriminates more broadly against all members of the protected class. For example, sex discrimination against working mothers is prohibited by Title VII even if the employer does not discriminate against childless women.[49]

EXAMPLE 1
UNLAWFUL DISCRIMINATION AGAINST WOMEN WITH YOUNG CHILDREN

Charmaine, a mother of two preschool-age children, files an EEOC charge alleging sex discrimination after she is rejected for an opening in her employer's executive training program. The employer asserts that it rejected Charmaine because candidates who were selected had better performance appraisals or more managerial experience and because she is not "executive material." The employer also contends that the fact that half of the selectees were women shows that her rejection could not have been because of sex. However, the investigation reveals that Charmaine had more managerial experience or better performance appraisals than several selectees and was better qualified than some selectees, including both men and women, as weighted pursuant to the employer's written selection policy. In addition, while the employer selected both men and women for the program, the only selectees with preschool age children were men. Under the circumstances, the investigator determines that Charmaine was subjected to discrimination based on her sex.

Title VII does not prohibit discrimination based solely on parental or other caregiver status, so an employer does not generally violate Title VII's disparate treatment proscription if, for example, it treats working mothers and working fathers in a similar unfavorable (or favorable) manner as compared to childless workers.

3. ***Unlawful Gender Role Stereotyping of Working Women***

Although women actually do assume the bulk of caretaking responsibilities in most families and many women do curtail their work responsibilities when they become caregivers, Title VII does not permit employers to treat female workers less favorably merely on the gender-based assumption that a particular female worker will assume caretaking responsibilities or that a female worker's caretaking responsibilities will interfere with her work performance.[50] Because stereotypes that female caregivers should not, will not, or cannot be committed to their jobs are sex-based, employment decisions based on such stereotypes violate Title VII.[51]

Gender-based Assumptions About Future Caregiving Responsibilities

Relying on stereotypes of traditional gender roles and the division of domestic and workplace responsibilities, some employers may assume that childcare responsibilities will make female employees less dependable than male employees, even if a female worker is not pregnant and has not suggested that she will become pregnant.[52] Fear of such stereotyping may even prompt married female job applicants to remove their wedding rings before going into an interview.[53]

EXAMPLE 2
UNLAWFUL STEREOTYPING DURING HIRING PROCESS

Patricia, a recent business school graduate, was interviewed for a position as a marketing assistant for a public relations firm. At the interview, Bob, the manager of the department with the vacancy being filled, noticed Patricia's wedding ring and asked, "How many kids do you have?" Patricia told Bob that she had no children yet but that she planned to once she and her husband had gotten their careers underway. Bob explained that the duties of a marketing assistant are very demanding, and rather than discuss Patricia's qualifications, he asked how she would balance work and childcare responsibilities when the need arose. Patricia explained that she would share childcare responsibilities with her husband, but Bob responded that men are not reliable caregivers. Bob later told his secretary that he was concerned about hiring a young married woman – he thought she might have kids, and he didn't believe that being a mother was "compatible with a fast-paced business environment." A week after the interview, Patricia was notified that she was not hired.

Believing that she was well qualified and that the interviewer's questions reflected gender bias, Patricia filed a sex discrimination charge with the EEOC. The investigator discovered that the employer reposted the position after rejecting Patricia. The employer said that it reposted the position because it was not satisfied with the experience level of the applicants in the first round. However, the investigation showed that Patricia easily met the requirements for the position and had as much experience as some other individuals recently hired as marketing assistants. Under the circumstances, the investigator determines that the respondent rejected Patricia from the first round of hiring because of sex-based stereotypes in violation of Title VII.

Mixed-motives Cases

An employer violates Title VII if the charging party's sex was a motivating factor in the challenged employment decision, regardless of whether the employer was also motivated by legitimate business reasons.[54] However, when an employer shows that it would have taken the same action even absent the discriminatory motive, the complaining employee will not be entitled to reinstatement, back pay, or damages.[55]

EXAMPLE 3
DECISION MOTIVATED BY BOTH UNLAWFUL STEREOTYPING AND LEGITIMATE BUSINESS REASON

Same facts as above except that the employer did not repost the position but rather hired Tom from the same round of candidates that Patricia was in. In addition, the record showed that other than Tom's greater experience, Tom and Patricia had similar qualifications but that the employer consistently used relevant experience as a tiebreaking factor in filling marketing positions. The investigator determines that the employer has violated Title VII because sex was a motivating factor in the employer's decision not to hire Patricia as evidenced by Bob's focus on caregiving responsibilities, rather than qualifications, when he interviewed Patricia and other female candidates. However, the employer would have selected Tom, even absent the discriminatory motive, based on his greater experience. Thus, Patricia may be entitled to attorney's fees and/or injunctive relief, but is not entitled to instatement, back pay, or compensatory or punitive damages.

Assumptions About the Work Performance of Female Caregivers

The effects of stereotypes may be compounded after female employees become pregnant or actually begin assuming caregiving responsibilities. For example, employers may make the stereotypical assumptions that women with young children will (or should) not work long hours and that new mothers are less committed to their jobs than they were before they had children.[56] Relying on such stereotypes, some employers may deny female caregivers opportunities based on assumptions about how they might balance work and family responsibilities. Employers may further stereotype female caregivers who adopt part-time or flexible work schedules as "homemakers" who are less committed to the workplace than their full-time colleagues.[57] Adverse employment decisions based on such sex-based assumptions or speculation, rather than on the specific work performance of a particular employee, violate Title VII.

EXAMPLE 4
UNLAWFUL SEX-BASED ASSUMPTIONS ABOUT WORK PERFORMANCE

Anjuli, a police detective, had received glowing performance reviews during her first four years with the City's police department and was assumed to be on a fast track for promotion. However, after she returned from leave to adopt a child during her fifth year with the department, her supervisor frequently asked how Anjuli was going to manage to stay on top of her case load while caring for an infant. Although Anjuli continued to work the same hours and close as many cases as she had before the

adoption, her supervisor pointed out that none of her superiors were mothers, and he removed her from her high-profile cases, assigning her smaller, more routine cases normally handled by inexperienced detectives. The City has violated Title VII by treating Anjuli less favorably because of gender-based stereotypes about working mothers.

EXAMPLE 5
UNLAWFUL STEREOTYPING BASED ON PARTICIPATION IN FLEXIBLE WORK ARRANGEMENT

Emily, an assistant professor of mathematics at the University for the past seven years, files a charge alleging that she was denied tenure based on her sex. Emily applied for tenure after she returned from six months of leave to care for her father. The University's flexible work program allowed employees to take leave for a year without penalty. Before taking leave, Emily had always received excellent performance reviews and had published three highly regarded books in her field. After returning from leave, however, Emily believed she was held to a higher standard of review than her colleagues who were not caregivers or had not taken advantage of the leave policies, as reflected in the lower performance evaluations that she received from the Dean of her department after returning from leave. Emily applied for tenure, but the promotion was denied by the Dean, who had a history of criticizing female faculty members who took time off from their careers and was heard commenting that "she's just like the other women who think they can come and go as they please to take care of their families."

While the University acknowledges that Emily was eligible for tenure, it asserts that it denied Emily tenure because of a decline in her performance. The investigation reveals, however, that Emily's post-leave work output and classroom evaluations were comparable to her work performance before taking leave. In addition, The University does not identify any specific deficiencies in Emily's performance that warranted the decline in its evaluation of her work. Under the circumstances, the investigator determines that Emily was denied tenure because of her sex.

Employment decisions that are based on an employee's actual work performance, rather than assumptions or stereotypes, do not generally violate Title VII, even if an employee's unsatisfactory work performance is attributable to caregiving responsibilities.

EXAMPLE 6
EMPLOYMENT DECISION LAWFULLY BASED ON ACTUAL WORK PERFORMANCE

After Carla, an associate in a law firm, returned from maternity leave, she began missing work frequently because of her difficulty in obtaining childcare and was unable to meet several important deadlines. As a result, the firm lost a big client, and Carla was given a written warning about her performance. Carla's continued childcare difficulties resulted in her missing further deadlines for several important projects. Two months after Carla was given the written warning, the firm transferred her to another department, where she would be excluded from most high-profile cases but would perform work that has fewer time constraints. Carla filed a charge alleging sex discrimination. The investigation revealed that Carla was treated comparably to other employees, both male and female, who had missed deadlines on high-profile projects or otherwise performed unsatisfactorily and had failed to improve within a reasonable period of time. Therefore, the employer did not violate Title VII by transferring Carla.

"Benevolent" Stereotyping

Adverse employment decisions based on gender stereotypes are sometimes well-intentioned and perceived by the employer as being in the employee's best interest.[58] For example, an employer might assume that a working mother would not want to relocate to another city, even if it would mean a promotion.[59] Of course, adverse actions that are based on sex stereotyping violate Title VII, even if the employer is not acting out of hostility.[60]

EXAMPLE 7
STEREOTYPING UNLAWFUL EVEN IF FOR BENEVOLENT REASONS

Rhonda, a CPA at a mid-size accounting firm, mentioned to her boss that she had become the guardian of her niece and nephew and they were coming to live with her, so she would need a few days off to help them settle in. Rhonda's boss expressed concern that Rhonda would be unable to balance her new family responsibilities with her demanding career, and was worried that Rhonda would suffer from stress and exhaustion. Two weeks later, he moved her from her lead position on three of the firm's biggest accounts and assigned her to supporting roles handling several smaller accounts. In doing so, the boss told Rhonda that he was transferring her so that she "would have more time to spend with her new family," despite the fact that Rhonda had asked for no additional leave and had been completing her work in a timely and satisfactory manner. At the end of the year, Rhonda, for the first time in her 7-year stint at the firm, is denied a pay raise, even though many other workers did receive raises. When she asks for an explanation, she is told that she needs to be available to work on bigger accounts if she wants to receive raises. Here, the employer has engaged in unlawful sex discrimination by taking an adverse action against a female employee based on stereotypical assumptions about women with caregiving responsibilities, even if the employer believed that it was acting in the employee's best interest.

In some circumstances, an employer will take an action that unlawfully imposes on a female worker the employer's own stereotypical views of how the worker *should* act even though the employer is aware that the worker objects. Thus, if a supervisor believes that mothers should not work full time, he or she might refuse to consider a working mother for a promotion that would involve a substantial increase in hours, even if that worker has made it clear that she would accept the promotion if offered.

EXAMPLE 8
DENIAL OF PROMOTION BASED ON STEREOTYPE OF HOW MOTHERS SHOULD ACT

Sun, a mid-level manager in a data services company, applied for a promotion to a newly created upper-level management position. At the interview for the promotion, the selecting official, Charlie, who had never met Sun before, asked her about her childcare responsibilities. Sun explained that she had two teenage children and that she commuted every week between her home in New York and the employer's main office in Northern Virginia. Charlie asked Sun how her husband handled the fact that she was "away from home so much, not caring for the family except on weekends." Sun explained that her husband and their children "helped each other" to function as "a successful family," but Charlie responded that he had "a very difficult time understanding why any man would allow his wife to live away from home during the work week." After Sun is denied the promotion, she files an EEOC charge alleging sex discrimination. According to the employer, it considered Sun and one other candidate for the promotion, and, although they were both well qualified, it did not select Sun because it felt that it was unfair to Sun's children for their mother to work so far from home. Under the circumstances, the investigator determines that the employer denied Sun the promotion because of unlawful sex discrimination, basing its decision in particular on stereotypes that women with children should not live away from home during the week.[61]

4. ***Effects of Stereotyping on Subjective Assessments of Work Performance***

In addition to leading to assumptions about how female employees might balance work and caregiving responsibilities, gender stereotypes of caregivers may more broadly affect perceptions of a worker's general competence.[62] Once female workers have children, they may be perceived by employers as being less capable and skilled than their childless female counterparts or their male counterparts, regardless of whether the male employees have children.[63] These gender-based stereotypes may even place some working mothers in a "double bind," in which they are simultaneously viewed by their employers as "bad mothers" for investing time and resources into their careers and "bad workers" for devoting time and attention to their families.[64] The double bind may be particularly acute for mothers or other female caregivers who work part time. Colleagues may view part-time working mothers as uncommitted to work while viewing full-time working mothers as inattentive mothers.[65] Men who work part time may encounter different, though equally harmful, stereotypes.[66]

Investigators should be aware that it may be more difficult to recognize sex stereotyping when it affects an employer's evaluation of a worker's general competence than when it leads to assumptions about how a worker will balance work and caregiving responsibilities. Such stereotyping can be based on unconscious bias, particularly where officials engage in subjective decisionmaking. As with other forms of gender stereotyping, comparative evidence showing more favorable treatment of male caregivers than female caregivers is helpful but not necessary to establish a violation.[67] Investigators should be particularly attentive, for example, to evidence of the following:

- Changes in an employer's assessment of a worker's performance that are not linked to changes in the worker's actual performance and that arise after the worker becomes pregnant or assumes caregiving responsibilities;
- Subjective assessments that are not supported by specific objective criteria; and
- Changes in assignments or duties that are not readily explained by nondiscriminatory reasons.

EXAMPLE 9
EFFECTS OF STEREOTYPING ON EMPLOYER'S PERCEPTION OF EMPLOYEE

Barbara, a highly successful marketing executive at a large public relations firm, recently became the primary caregiver for her two young grandchildren. Twice a month, Barbara and her marketing colleagues are expected to attend a 9 a.m. corporate sales meeting. Last month, Barbara arrived a few minutes late to the meeting. Barbara did not think her tardiness was noteworthy since one of her colleagues, Jim, regularly arrived late to the meetings. However, after her late arrival, Barbara's boss, Susan, severely criticized her for the incident and informed her that she needed to start keeping a daily log of her activities.

The next month, Susan announced that one of the firm's marketing executives would be promoted to the position of Vice President. After Susan selected Jim, Barbara filed a charge alleging that she was denied the promotion because of her sex. According to Susan, she selected Jim because she believed that he was more "dependable, reliable, and committed to his work" than other candidates. Susan explained to the investigator that she thought as highly of Barbara's work as she did of Jim's, but she decided not to promote a worker who arrived late to sales meetings, even if it was because of childcare responsibilities. Other employees stated that they could only remember Barbara's being late on one occasion, but that Jim had been late on numerous occasions. When asked about this, Susan admitted that she might have forgotten about the times when Jim was late, but still considered Jim to be much more dependable. The investigator asks Susan for more specifics, but Susan merely responds that her opinion was based on many years of experience working with both Barbara and Jim. Under the circumstances, the investigator concludes that Susan denied Barbara the promotion because of her sex.

EXAMPLE 10
SUBJECTIVE DECISIONMAKING BASED ON NONDISCRIMINATORY FACTORS

Simone, the mother of two elementary-school-age children, files an EEOC charge alleging sex discrimination after she is terminated from her

position as a reporter with a medium-size newspaper. The employer asserts that it laid Simone off as part of a reduction in force in response to decreased revenue. The employer states that Simone's supervisor, Alex, compared Simone with two other reporters in the same department to determine whom to lay off. According to Alex, he considered Jocelyn (an older woman with two grown children) to be a superior worker to Simone because Jocelyn's work needed less editing and supervision and she had the most experience of anyone in the department. Alex said he also favored Louis (a young male worker with no children) over Simone because Louis had shown exceptional initiative and creativity by writing several stories that had received national publicity and by creating a new feature to increase youth readership and advertising revenue. Alex said that he considered Simone's work satisfactory, but that she lacked the unique talents that Jocelyn and Louis brought to the department. Because the investigation does not reveal that the reasons provided by Alex are a pretext for sex discrimination, the investigator does not find that Simone was subjected to sex discrimination.

B. ***Pregnancy Discrimination***

Employers can also violate Title VII by making assumptions about pregnancy, such as assumptions about the commitment of pregnant workers or their ability to perform certain physical tasks.[68] As the Supreme Court has noted, "[W]omen as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job."[69] Title VII's prohibition against sex discrimination includes a prohibition against employment decisions based on pregnancy, even where an employer does not discriminate against women generally.[70] As with other sex-based stereotypes, Title VII prohibits an employer from basing an adverse employment decision on stereotypical assumptions about the effect of pregnancy on an employee's job performance, regardless of whether the employer is acting out of hostility or a belief that it is acting in the employee's best interest.

Because Title VII prohibits discrimination based on pregnancy, employers should not make pregnancy-related inquiries. The EEOC will generally regard a pregnancy-related inquiry as evidence of pregnancy discrimination where the employer subsequently makes an unfavorable job decision affecting a pregnant worker.[71] Employers should be aware that pregnancy testing also implicates the ADA, which restricts employers' use of medical examinations. [72] Given the potential Title VII and ADA implications, the Commission strongly discourages employers from making pregnancy-related inquiries or conducting pregnancy tests.

An employer also may not treat a pregnant worker who is temporarily unable to perform some of her job duties because of pregnancy less favorably than workers whose job performance is similarly restricted because of conditions other than pregnancy. For example, if an employer provides up to eight weeks of paid leave for temporary medical conditions, then the employer must provide up to eight weeks of paid leave for pregnancy or related medical conditions.[73]

For more information on pregnancy discrimination under Title VII, see "Questions and Answers on the Pregnancy Discrimination Act," 29 C.F.R. Part 1604 Appendix (1978).

EXAMPLE 11
UNLAWFUL STEREOTYPING BASED ON PREGNANCY

Anna, a records administrator for a health maintenance organization, was five months pregnant when she missed two days of work due to a pregnancy-related illness. Upon her return to work, Anna's supervisor, Tom, called her into his office and told her that "her body was trying to tell her something" and that "her attendance was becoming a serious problem." Anna reminded him that she had only missed two days and that her doctor had found no continuing complications related to her brief illness. However, Tom responded, "Well, now that you're pregnant, you will probably miss a lot of work, and we need someone who will be dependable." Tom placed Anna on an unpaid leave of absence, telling her that she would be able to return to work after she had delivered her baby and had time to recuperate and that "not working [was] the best thing for [her] right now." In response to Anna's EEOC charge alleging pregnancy discrimination, the employer states that it placed Anna on leave because of poor attendance. The investigation reveals, however, that Anna had an excellent attendance record before she was placed on leave. In the prior year, she had missed only three days of work because of illness, including two days for her pregnancy-related illness and one day when she was ill before she became pregnant. The investigator concludes that the employer subjected Anna to impermissible sex discrimination under Title VII by basing its action on a stereotypical assumption that pregnant women are poor attendees and that Anna would be unable to meet the requirements of the job.[74]

EXAMPLE 12
UNLAWFUL REFUSAL TO MODIFY DUTIES

Ingrid, a pregnant machine operator at a bottling company, is told by her doctor to temporarily refrain from lifting more than 20 pounds. As part of her job as a machine operator, Ingrid is required to carry certain materials weighing more than 20 pounds to and from her machine several times each day. She asks her supervisor if she can be temporarily relieved of this function. The supervisor refuses, stating that he can't reassign her job duties but can transfer her temporarily to another lower-paying position for the duration of the lifting restriction. Ingrid reluctantly accepts the transfer but also files an EEOC charge alleging sex discrimination. The investigation reveals that in the previous six months, the employer had reassigned the lifting duties of three other machine operators, including a man who injured his arm in an automobile accident and a woman who had undergone surgery to treat a hernia. Under the circumstances, the investigator determines that the employer subjected Ingrid to discrimination based on sex (i.e., pregnancy).

C. ***Discrimination Against Male Caregivers***[75]

The Supreme Court has observed that gender-based stereotypes also influence how male workers are perceived: "Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination."[76] Stereotypes of men as "bread winners" can further lead to the perception that a man who works part time is not a good father, even if he does so to care for his children.[77] Thus, while working women have generally borne the brunt of gender-based stereotyping, unlawful assumptions about working fathers

and other male caregivers have sometimes led employers to deny male employees opportunities that have been provided to working women or to subject men who are primary caregivers to harassment or other disparate treatment.[78] For example, some employers have denied male employees' requests for leave for childcare purposes even while granting female employees' requests. For more information on how to determine whether an employee has been subjected to unlawful disparate treatment, see the discussion at § II.A.1, above, "Sex-based Disparate Treatment of Female Caregivers – Analysis of Evidence."

Significantly, while employers are permitted by Title VII to provide women with leave specifically for the period that they are incapacitated because of pregnancy, childbirth, and related medical conditions, employers may not treat either sex more favorably with respect to other kinds of leave, such as leave for childcare purposes.[79] To avoid a potential Title VII violation, employers should carefully distinguish between pregnancy-related leave and other forms of leave, ensuring that any leave specifically provided to women alone is limited to the period that women are incapacitated by pregnancy and childbirth.[80]

EXAMPLE 13
EMPLOYER UNLAWFULLY DENIED BENEFIT TO MALE WORKER BECAUSE OF GENDER-BASED STEREOTYPE

Eric, an elementary school teacher, requests unpaid leave for the upcoming school year for the purpose of caring for his newborn son. Although the school has a collective bargaining agreement that allows for up to one year of unpaid leave for various personal reasons, including to care for a newborn, the Personnel Director denies the request. When Eric points out that women have been granted childcare leave, the Director says, "That's different. We have to give childcare leave to women." He suggests that Eric instead request unpaid emergency leave, though that is limited to 90 days. This is a violation of Title VII because the employer is denying male employees a type of leave, unrelated to pregnancy, that it is granting to female employees.

EXAMPLE 14
EMPLOYER UNLAWFULLY DENIED PART-TIME POSITION TO MALE WORKER BECAUSE OF SEX

Tyler, a service technician for a communications company, requests reassignment to a part-time position so that he can help care for his two-year-old daughter when his wife returns to work. Tyler's supervisor, however, rejects the request, saying that the department has only one open slot for a part-time technician, and he has reserved it in case it is needed by a female technician. Tyler's supervisor says that Tyler can have a part-time position should another one open up. After two months, no additional slots have opened up, and Tyler files an EEOC charge alleging sex discrimination. Under the circumstances the employer has discriminated against Tyler based on sex by denying him a part-time position.

D. ***Discrimination Against Women of Color***

In addition to sex discrimination, race or national origin discrimination may be a further employment barrier faced by women of color who are caregivers. For example, a Latina working mother might be subjected to discrimination by her supervisor based on his stereotypical notions about working mothers or pregnant workers, as well as his hostility toward Latinos generally. Women of color also may be subjected to intersectional discrimination that is specifically directed toward women of a particular race or ethnicity, rather than toward all women, resulting, for example, in less favorable treatment of an African American working mother than her White counterpart.[81]

EXAMPLE 15
UNLAWFUL DENIAL OF COMPENSATORY TIME BASED ON RACE

Margaret, an African American employee in the City's Parks and Recreation Department, files an EEOC charge alleging that she was denied the opportunity to use compensatory time because of her race. She asked her supervisor, Sarah, for the opportunity to use compensatory time so she could occasionally be absent during regular work hours to address personal responsibilities, such as caring for her children when she does not have a sitter. Sarah rejected the request, explaining that Margaret's position has set hours and that any absences must be under the official leave policy. The investigation reveals that while the City does not have an official compensatory time policy, several White employees in Margaret's position have been allowed to use compensatory time for childcare purposes. When asked about this discrepancy, Sarah merely responds that those employees' situations were "different." In addition, the investigation reveals that while White employees have been allowed to use compensatory time, no African Americans have been allowed to do so. Under the circumstances, the investigator determines that Margaret was unlawfully denied the opportunity to use compensatory time based on her race.

EXAMPLE 16
UNLAWFUL HARASSMENT AND REASSIGNMENT BASED ON SEX AND NATIONAL ORIGIN

Christina, a Mexican-American, filed an EEOC charge alleging that she was subjected to discrimination based on national origin and pregnancy. Christina had worked as a server waiting tables at a large chain restaurant until she was reassigned to a kitchen position when she was four months pregnant. One of Christina's supervisors has regularly made comments in the workplace about how Mexicans are entering the country illegally and taking jobs from other people. After Christina becomes pregnant, he began directing the comments at Christina, telling her that Mexican families are too large and that it is not fair for Mexicans to come to the United States and "take over" and use up tax dollars. When he reassigned Christina, he explained to her that he thought customers' appetites would be spoiled if they had their food brought to them by someone who was pregnant. Under these circumstances, the evidence shows that Christina was subjected to discrimination based on both sex (pregnancy) and national origin.

E. ***Unlawful Caregiver Stereotyping Under the Americans with Disabilities Act***

In addition to prohibiting discrimination against a qualified worker because of his or her own disability, the Americans with Disabilities Act (ADA) prohibits discrimination because of the disability of an individual with whom the worker has a relationship or association, such as a child, spouse, or parent.[82] Under this

provision, an employer may not treat a worker less favorably based on stereotypical assumptions about the worker's ability to perform job duties satisfactorily while also providing care to a relative or other individual with a disability. For example, an employer may not refuse to hire a job applicant whose wife has a disability because the employer assumes that the applicant would have to use frequent leave and arrive late due to his responsibility to care for his wife.[83] For more information, see EEOC's *Questions and Answers About the Association Provision of the ADA* at http://www.eeoc.gov/facts/association_ada.html.

EXAMPLE 17
UNLAWFUL STEREOTYPING BASED ON ASSOCIATION WITH AN INDIVIDUAL WITH A DISABILITY

An employer is interviewing applicants for a computer programmer position. The employer determines that one of the applicants, Arnold, is the best qualified, but is reluctant to hire him because he disclosed during the interview that he is a divorced father and has sole custody of his son, who has a disability. Because the employer concludes that Arnold's caregiving responsibilities for a person with a disability may have a negative effect on his attendance and work performance, it decides to offer the position to the second best qualified candidate, Fred, and encourages Arnold to apply for any future openings if his caregiving responsibilities change. Under the circumstances, the employer has violated the ADA by refusing to hire Arnold because of his association with an individual with a disability.

F. ***Hostile Work Environment***

Employers may be liable if workers with caregiving responsibilities are subjected to offensive comments or other harassment because of race, sex (including pregnancy), association with an individual with a disability,[84] or another protected characteristic and the conduct is sufficiently severe or pervasive to create a hostile work environment. [85] The same legal standards that apply to other forms of harassment prohibited by the EEO statutes also apply to unlawful harassment directed at caregivers or pregnant workers.

Employers should take steps to prevent harassment directed at caregivers or pregnant workers from occurring in the workplace and to promptly correct any such conduct that does occur. In turn, employees who are subjected to such harassment should follow the employer's harassment complaint process or otherwise notify the employer about the conduct, so that the employer can investigate the matter and take appropriate action. For more information on harassment claims generally, see *EEOC Policy Guidance on Current Issues of Sexual Harassment* (Mar. 19, 1990) at http://www.eeoc.gov/policy/docs/currentissues.html, and Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 19, 1999) at http://www.eeoc.gov/policy/docs/harassment.html.

EXAMPLE 18
HOSTILE WORK ENVIRONMENT BASED ON STEREOTYPES OF MOTHERS

After Yael, a supervisor at a construction site, returned to work from maternity leave, she asked her supervisor, Rochelle, for permission to use her lunch break to breastfeed her child at the child's day care center. Rochelle agreed, but added, "Now that you're a mother, you won't have the same dedication to the job. That's why I never had any kids! Maybe you should rethink being a supervisor." She also began monitoring Yael's time, tracking when Yael left and returned from her lunch break and admonishing her if she was late, even only a few minutes. Other employees who left the site during lunch were not similarly monitored. Rochelle warned Yael that if she had another child, she could "kiss her career goodbye," and that it was impossible for any woman to be a good mother and a good supervisor at the same time. Yael is very upset by her supervisor's conduct and reports it to a higher-level manager. However, the employer refuses to take any action, stating that Yael is merely complaining about a "personality conflict" and that he does not get involved in such personal matters. After the conduct continues for several more months, Yael files an EEOC charge alleging that she was subjected to sex-based harassment. Under the circumstances, the investigator determines that Yael was subjected to a hostile work environment based on sex and that the employer is liable.

EXAMPLE 19
HOSTILE WORK ENVIRONMENT BASED ON PREGNANCY

Ramona, an account representative, had been working at a computer software company for five years when she became pregnant. Until then, she had been considered a "top performer," and had received multiple promotions and favorable evaluations. During Ramona's pregnancy, her supervisor, Henry, frequently made pregnancy-related comments, such as, "You look like a balloon; why don't you waddle on over here?" and, "Pregnant workers hurt the company's bottom line." Henry also began treating Ramona differently from other account representatives by, for example, asking for advance notification and documentation of medical appointments – a request that was not made of other employees who took leave for medical appointments nor of Ramona before her pregnancy.

After Ramona returned from maternity leave, Henry continued to treat her differently from other account representatives. For example, shortly after Ramona returned from maternity leave, Henry gave Ramona's coworkers an afternoon off so that they could attend a local fair as a "reward" for having covered Ramona's workload while she was on leave, but required Ramona to stay in the office and answer the phones. On another occasion, Ramona requested a schedule change so that she could leave earlier to pick up her son from daycare, but Henry denied the request without explanation, even though other employees' requests for schedule changes were granted freely, regardless of the reason for the request. Henry also continued to make pregnancy-related comments to Ramona on a regular basis. For example, after Ramona returned from maternity leave, she and Henry were discussing a coworker's pregnancy, and Henry sarcastically commented to Ramona, "I suppose you'll be pregnant again soon, and we'll be picking up the slack for you just like the last time."

Ramona complained about Henry's conduct to the Human Resources Manager, but he told her he did not want to take sides and that matters like schedule changes were within managerial discretion. After the conduct had continued for several months, Ramona filed an EEOC charge alleging that she had been subjected to a hostile work environment because of her pregnancy and use of maternity leave. Noting that Ramona experienced ongoing abusive conduct after she became pregnant, the investigator determines that Ramona has been subjected to a hostile work environment based on pregnancy and that the employer is liable.[86]

EXAMPLE 20
HOSTILE WORK ENVIRONMENT BASED ON ASSOCIATION WITH AN INDIVIDUAL WITH A DISABILITY

Martin, a first-line supervisor in a department store, had an excellent working relationship with his supervisor, Adam, for many years. However, shortly after Adam learned that Martin's wife has a severe form of multiple sclerosis, his relationship with Martin deteriorated. Although Martin had always been a good performer, Adam repeatedly expressed his concern that Martin's responsibilities caring for his wife would prevent him from being able to meet the demands of his job. Adam removed Martin from team projects, stating that Martin's coworkers did not think that Martin could be expected to complete his share of the work "considering all of his wife's medical problems." Adam set unrealistic time frames for projects assigned to Martin and yelled at him in front of coworkers about the need to meet approaching deadlines. Adam also began requiring Martin to follow company policies that other employees were not required to follow, such as requesting leave at least a week in advance except in the case of an emergency. Though Martin complained several times to upper management about Adam's behavior, the employer did nothing. Martin files an EEOC charge, and the investigator determines that the employer is liable for harassment on the basis of Martin's association with an individual with a disability.

III. ***RETALIATION***

Employers are prohibited from retaliating against workers for opposing unlawful discrimination, such as by complaining to their employers about gender stereotyping of working mothers, or for participating in the EEOC charge process, such as by filing a charge or testifying on behalf of another worker who has filed a charge. Because discrimination against caregivers may violate the EEO statutes, retaliation against workers who complain about such discrimination also may violate the EEO statutes.[87]

The retaliation provisions under the EEO statutes protect individuals against any form of retaliation that would be reasonably likely to deter someone from engaging in protected activity.[88] Caregivers may be particularly vulnerable to unlawful retaliation because of the challenges they face in balancing work and family responsibilities. An action that would be likely to deter a working mother from filing a future EEOC complaint might be less likely to deter someone who does not have substantial caregiving responsibilities. As the Supreme Court noted in a 2006 decision, "A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children."[89] Thus, the EEO statutes would prohibit such a retaliatory schedule change or any other act that would be reasonably likely to deter a working mother or other caregiver from engaging in protected activity.

Footnotes

[1] For more information on the FMLA, see Compliance Assistance – Family and Medical Leave Act, http://www.dol.gov/esa/whd/fmla/ (U.S. Department of Labor web page); *see also* EEOC Fact Sheet, *The Family and Medical Leave Act, the Americans with Disabilities Act, and Titl e VII of the Civil Rights Act of 1964* (1995), http://www.eeoc.gov/policy/docs/fmlaada.html (discussing questions that arise under Title VII and the ADA when the FMLA also applies).

While federal law does not prohibit discrimination based on parental status, some state and local laws do prohibit discrimination based on parental or similar status. *E.g.*, ALASKA STAT. § 18.80.200 (prohibiting employment discrimination based on "parenthood"); D.C. Human Rights Act, D.C. CODE § 2-1402.11 (prohibiting employment discrimination based on "family responsibilities").

[2] In 1970, 43% of women were in the labor force while 59% of women were in the labor force in 2005. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, WOMEN IN THE LABOR FORCE: A DATABOOK 1 (2006) [hereinafter DATABOOK], http://www.bls.gov/cps/wlf-databook-2006.pdf.

[3] AFL-CIO, PROFESSIONAL WOMEN: VITAL STATISTICS (2006), http://www.pay-equity.org/PDFs/ProfWomen.pdf (in 2005, women accounted for 46.4% of the labor force).

[4] DATABOOK, *supra* note 2, Table 7 (59% of mothers with children under 3 were in the civilian labor force in 2005, compared with 34% in 1975).

[5] BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, WORKING IN THE 21ST CENTURY, http://www.bls.gov/opub/working/home.htm (combined work hours per week for married couples with children under 18 increased from 55 hours in 1969 to 66 hours in 2000).

[6] Testimony of Heather Boushey, Senior Economist, Center for Economic and Policy Research, to the EEOC, Apr. 17, 2007, http://www.eeoc.gov/abouteeoc/meetings/4-17-07/boushey.html ("For many families, having a working wife can make the difference between being middle class and not. . . . The shift in women's work participation is not simply about women wanting to work, but it is also about their families needing them to work.").

[7] *See generally* Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 378-80 (2001) (discussing women's continued role as primary caregivers in our society and citing studies).

BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, AMERICAN TIME-USE SURVEY (2006), Table 8, http://www.bls.gov/news.release/pdf/atus.pdf (in 2005, in households with children under 6, working women spent an average of 2.17 hours per day providing care for household members compared with 1.31 hours for working men; in households with children 6 to 17, working women spent an average of .99 hours per day providing care for household members compared with .50 for working men).

[8] *See generally* Peggie R. Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 BERKELEY J. EMP. & LAB. L. 351, 355-60 (2004).

[9] *Id*. at 360 (noting that women provide about 70% of unpaid elder care); see *also Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 738 (2003) (noting that working women provide two-thirds of the nonprofessional care for older, chronically ill, and disabled individuals); Cathy D.

Martin, *More Than the Work: Race and Gender Differences in Caregiving Burden*, 21 JOURNAL OF FAMILY ISSUES 986, 989-90 (2000) (discussing greater role women play in providing eldercare).

[10] Smith, *supra* note 8, at 365-70.

[11] *See* BOSTON COLL. CTR. FOR WORK & FAMILY, EXECUTIVE BRIEFING SERIES, EXPLORING THE COMPLEXITIES OF EXCEPTIONAL CAREGIVING (2006) (contact the Center to order copies of the Executive Briefing Series, 617-552-2865 or cwf@bc.edu).

[12] *See generally* DEP'T OF HEALTH & HUMAN SERVS., INFORMAL CAREGIVING: COMPASSION IN ACTION (1998) (hereinafter INFORMAL CAREGIVING), http://aspe.hhs.gov/daltcp/reports/carebro2.pdf.

[13] U.S. CENSUS BUREAU, DISABILITY AND AMERICAN FAMILIES: 2000, at 3, 16 (2005), http://www.census.gov/prod/2005pubs/censr-23.pdf#search=%22disability%20american%20families%202000%22.

[14] INFORMAL CAREGIVING, *supra* note 12, at 11.

[15] *See, e.g.*, Lynette Clemetson, *Work vs. Family, Complicated by Race*, N.Y. TIMES, Feb. 9, 2006, at G1 (discussing unique work-family conflicts faced by African American women).

[16] For example, by 1900, 26% of married African American women were wage earners, compared with 3.2% of their White counterparts. JENNIFER TUCKER & LESLIE R. WOLFE, CTR. FOR WOMEN POLICY STUDIES, DEFINING WORK AND FAMILY ISSUES: LISTENING TO THE VOICES OF WOMEN OF COLOR 4 (1994) (citing other sources). More recently, in 1970, more than 70% of married African American middle-class women and nearly 45% of married African American working-class women were in the labor force compared with 48% and 32%, respectively, of their White counterparts. LONNAE O'NEAL PARKER, I'M EVERY WOMAN: REMIXED STORIES OF MARRIAGE, MOTHERHOOD AND WORK 29 (2005).

[17] DATABOOK, *supra* note 2, Table 5 (in 2005, 68% of African American women with children under the age of 3 were in the workforce compared with 58% of White women, 53% of Asian American women, and 45% of Hispanic women).

[18] POPULATION REFERENCE BUREAU, *Diversity, Poverty Characterize Female Headed Households*, http://www.prb.org/Articles/2003/DiversityPovertyCharacterizeFemaleHeadedHouseholds.aspx (about 5% of White or Asian American households are female-headed households with children compared with 22% of African American households and 14% of Hispanic households).

Native American women may have greater childcare responsibilities and are less likely to be employed than their White or African American counterparts. Native American women may have special family and community obligations based on tribal culture and often have more children than do White or African American women. Job opportunities may be further limited since Native American women often live in remote areas where the few available jobs tend to be in traditionally male-dominated industries. THE NATIVE NORTH AMERICAN ALMANAC 1088 (2d ed. 2001).

[19] U.S. CENSUS BUREAU, GRANDPARENTS LIVING WITH GRANDCHILDREN: 2000, Table 1 (2003),http://www.census.gov/prod/2003pubs/c2kbr-31.pdf (showing a higher proportion of African American and Native American grandmothers responsible for raising grandchildren than White, Asian, or Hispanic grandmothers).

[20] *See* NAT'L ASS'N OF STATE UNITS ON AGING, IN THE MIDDLE: A REPORT ON MULTICULTURAL BOOMERS COPING WITH FAMILY AND AGING ISSUES (2001), http://www.nasua.org/familycaregiver/rbv1/rbv1b11.pdf (in survey of Baby Boomers in the "sandwich generation," one in five White respondents reported providing eldercare or financial assistance to their parents, compared with two in five Asian Americans or one in three Hispanics or African Americans); see also Karen Bullock et al., *Employment and Caregiving*: *Exploration of African American Caregivers*, SOCIAL WORK 150 (Apr. 2003) (discussing impact of eldercare responsibilities on employment status of African Americans).

[21] Donna St. George, *Fathers Are No Longer Glued to Their Recliners*, WASH. POST, Mar. 20, 2007, at A11 (men's childcare work increased from 2.5 hours to 7 hours per week between 1965 and 2003). The total workload of married mothers and fathers combining paid work, childcare, and housework is about equal at 65 hours per week for mothers and 64 hours per week for fathers. *Id.*; see also SUZANNE BIANCHI ET AL., CHANGING RHYTHMS OF AMERICAN FAMILY LIFE (2006).

[22] *See, e.g.*, KAREN L. BREWSTER & BRYAN GIBLIN, EXPLAINING TRENDS IN COUPLES' USE OF FATHERS AS CHILDCARE PROVIDERS, 1985.2002, at 2.3 (2005), http://www.fsu.edu/~popctr/papers/floridastate/05-151paper.pdf (percentage of employed married women who relied on their husbands as the primary childcare provider increased from 16.6% in 1985 to 23.2% in 2002).

[23] *See generally* Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77 (2003) (discussing "maternal wall" discrimination, which limits the employment opportunities of workers with caregiving responsibilities). See also MARY STILL, UNIV. OF CAL., HASTINGS COLL. OF LAW, LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES (2005), http://www.uchastings.edu/site_files/WLL/FRDreport.pdf (documenting rise in lawsuits alleging discrimination against caregivers).

[24] *See generally* JOAN WILLIAMS, UNIV. OF CAL., HASTINGS COLL. OF LAW, ONE SICK CHILD AWAY FROM BEING FIRED: WHEN "OPTING OUT" IS NOT AN OPTION (2006), http://www.uchastings.edu/site_files/WLL/onesickchild.pdf.

[25] The median weekly earnings of full-time wage and salary workers in 2005 were $596 for White women compared with $499 for African American women and $429 for Hispanic women. DATABOOK, *supra* note 2, Table 16. While the weekly median earnings for Asian American women, $665, exceed the earnings of White women, id., the earnings of Asian American women vary widely depending on national origin. *See Socioeconomic Statistics and Demographics*, Asian Nation, http://www.asian-nation.org/demographics.shtml (discussing the wide disparity in socioeconomic attainment rates among Asian Americans).

[26] ONE SICK CHILD AWAY FROM BEING FIRED, *supra* note 24, at 8.

[27] *E.g.*, ONE SICK CHILD AWAY FROM BEING FIRED, *supra* note 24, at 23 (discussing case presented to arbitrator where employee with nine years of service was discharged for absenteeism when she left work after receiving a phone call that her four-year-old daughter had fallen and was being taken to the emergency room).

[28] EQUAL EMPLOYMENT OPPORTUNITY COMM'N, GLASS CEILING: THE STATUS OF WOMEN AS OFFICIALS AND MANAGERS IN THE PRIVATE SECTOR (2004), http://www.eeoc.gov/stats/reports/glassceiling/index.html.

[29] Diane Stafford, *Wanted: Women in the Workplace*, MONTEREY COUNTY HERALD, Apr. 5, 2006, available at 2006 WLNR 5689048.

[30] GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL, Washington, D.C.: U.S. Gov't Printing Office, at 3. The Glass Ceiling Commission was established under the Civil Rights Act of 1991 to complete a study of the barriers to advancement faced by women and minorities. A copy of the Commission's 1995 fact-finding report is available at http://digitalcommons.ilr.cornell.edu/key_workplace/116.

[31] *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 738 (2003) (holding that the family-leave provision of the Family and Medical Leave Act is a valid exercise of congressional power to combat sex discrimination by the states); *see also Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971) (Marshall, J., concurring) (Title VII does not permit "ancient canards about the proper role of women to be a basis for discrimination").

[32] *Hibbs*, 538 U.S. at 731 (in an FMLA claim brought by a male worker who was denied leave to care for his ailing wife, the Court noted that states' administration of leave benefits has fostered the "pervasive sex-role stereotype that caring for family members is women's work").

[33] *See* SHELLEY CORRELL & STEPHEN BENARD, GETTING A JOB: IS THERE A MOTHERHOOD PENALTY? (2005) (women with children were recommended for hire and promotion at a much lower rate than women without children).

[34] *See Knussman v. Maryland*, 272 F.3d 625, 629-30 (4th Cir. 2001) (male employee was not eligible for "nurturing leave" as primary caregiver of newborn unless his wife were "in a coma or dead").

[35] See § II.D, *infra* (discussing disparate treatment of women of color who are caregivers).

[36] This document addresses only disparate treatment, or intentional discrimination, against caregivers. It does not address disparate impact discrimination.

[37] *See Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 61 (1st Cir. 1999) ("concept of 'stereotyping' includes not only simple beliefs such as 'women are not aggressive' but also a host of more subtle cognitive phenomena which can skew perceptions and judgments").

[38] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion).

[39] *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004).

[40] For example, results of internal employee surveys as reported by Eli Lilly revealed that employees with the most flexibility and control over their hours reported more job satisfaction, greater sense of control, and less intention to leave than those on other schedules. CORPORATE VOICES FOR WORKING FAMILIES, BUSINESS IMPACTS OF FLEXIBILITY: AN IMPERATIVE FOR EXPANSION (2005) 13, http://www.cvworkingfamilies.org/flex_report/flex_report.shtml.

[41] In a 2005 study, almost half of the employers that offer flexible work schedules or other programs to help employees balance work and family responsibilities stated that the main reason they did so was to recruit and retain employees, and one-quarter said they did so mainly to enhance productivity and commitment. FAMILIES AND WORK INST., NATIONAL STUDY OF EMPLOYERS 26 (2005), http://familiesandwork.org/eproducts/2005nse.pdf; *see also* Work Life, Fortune Special Section, http://www.timeinc.net/fortune/services/sections/fortune/corp/2004_09worklife.html (2004) (noting that "smart companies are retaining talent by offering employees programs to help them manage their work and personal life priorities").

[42] For example, based on the proportion of workers who said they would have left in the absence of flexible workplace policies, the accounting firm Deloitte and Touche calculated that it saved $41.5 million in turnover-related costs in 2003 alone. CORPORATE VOICES, *supra note* 40, at 10.

[43] *See Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 121 (2d Cir. 2004) (female school psychologist with a young child could show that she was denied tenure because of her sex by relying on evidence of gender-based comments about working mothers and other evidence of sex stereotyping and was not required to show that similarly situated male workers were treated more favorably); *Plaetzer v. Borton Auto., Inc.*, No. Civ. 02-3089 JRT/JSM, 2004 WL 2066770, at *6 n.3 (D. Minn. Aug. 13, 2004) (evidence of more favorable treatment of working fathers is not needed to show sex discrimination against working mothers where an "employer's objection to an employee's parental duties is actually a veiled assertion that mothers, because they are women, are insufficiently devoted to work, or that work and motherhood are incompatible"); *cf. Lust*, 383 F.3d at 583 (reasonable jury could have concluded that the plaintiff's supervisor did not recommend her for a promotion because he assumed that, as a working mother, the plaintiff would not accept a promotion that would require her to move because of its disruptive effect on her children). *But see Philipsen v. University of Mich. Bd. of Regents*, No. 06-CV-11977-DT, 2007 WL 907822 (E.D. Mich. Mar. 22, 2007) (holding that a plaintiff cannot establish a prima facie case of sex discrimination against women with young children in the absence of comparative evidence that men with young children are treated more favorably). While the Commission agrees that the plaintiff raised no inference of sex discrimination, it believes that cases should be resolved on the totality of the evidence and concurs with *Back* and *Plaetzer* that comments evincing sex-based stereotypical views of women with children may support an inference of discrimination even absent comparative evidence about the treatment of men with children.

[44] *E.g., Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000) (comments by decisionmakers reflecting concern that the plaintiff might not be able to balance work and family responsibilities after she had a second child could lead a jury to conclude that the plaintiff was fired because of sex).

[45] *Sigmon v. Parker Chapin Flattau & Klimpl*, 901 F. Supp. 667, 678 (S.D.N.Y. 1995) (the plaintiff's only "deeply critical" performance evaluation was received shortly after she announced her pregnancy and therefore could be discounted).

[46] *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (evidence showed that the employer had a policy of not hiring women with preschool age children, but did not have a policy of not hiring men with preschool age children).

[47] *Sigmon*, 901 F. Supp. at 678 (reasonable factfinder could conclude that the decreasing number of women in the corporate department was caused by sex discrimination where tension between female associates and the employer regarding the maternity leave policy contributed to the high separation rate of pregnant women and mothers).

[48] For more information on the kinds of evidence that may be relevant in a disparate treatment case, see EEOC Compliance Manual: *Race Discrimination*, Volume II, § 15-V, A.2, "Conducting a Thorough Investigation" (2006), http://www.eeoc.gov/policy/docs/race-color.html#VA2.

[49] *Martin Marietta Corp.*, 400 U.S. at 545 (Title VII prohibits employer from hiring men with preschool age children while refusing to hire women with preschool age children). Some courts

and commentators have used the term "sex plus" to describe cases in which the employer discriminates against a subclass of women or men, i.e., sex plus another characteristic, such as caregiving or marriage. *See, e.g., Philipsen v. University of Mich. Bd. of Regents*, No. 06-CV-11977-DT, 2007 WL 907822, at *4 (E.D. Mich. Mar. 22, 2007) ("sex plus" discrimination is discrimination based on sex in conjunction with another characteristic); *Gee-Thomas v. Cingular Wireless*, 324 F. Supp. 2d 875 (M.D. Tenn. 2004) ("Title VII also prohibits so-called 'gender plus' or 'sex plus' discrimination, by which an employer discriminates, not against the class of men or women as a whole, but against a subclass of men or women so designated by their sex plus another characteristic."); Regina E. Gray, Comment, *The Rise and Fall of the "Sex Plus" Discrimination Theory: An Analysis of* Fisher v. Vassar College, 42 How. L. J. 71 (1998). In Back, the Second Circuit explained that the term "sex plus" is merely a concept used to illustrate that a Title VII plaintiff can sometimes survive summary judgment even when not all members of the protected class are subjected to discrimination. The Commission agrees with the *Back* court that, in practice, the term "sex plus" is "often more than a little muddy" and that the "[t]he relevant issue is not whether a claim is characterized as 'sex plus' or 'gender plus,' but rather, whether the plaintiff provides evidence of purposefully sex-discriminatory acts." 365 F.3d at 118-19 & n.8.

[50] *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004) ("Realism requires acknowledgment that the average mother is more sensitive than the average father to the possibly disruptive effect on children of moving to another city, but the antidiscrimination laws entitle individuals to be evaluated as individuals rather than as members of groups having certain average characteristics."); *see also Manhart v . City of Los Angeles, Dep't of Water & Power*, 435 U.S. 702, 708 (1978) ("[Title VII's] focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. . . . Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.").

[51] *Back*, 365 F.3d at 121 (in a sex discrimination claim under 42 U.S.C. § 1983, the court stated that "where stereotypes are considered, the notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based").

[52] Marion Crain, "*Where Have All the Cowboys Gone?" Marriage and Breadwinning in Postindustrial Society*, 60 OHIO ST. L.J. 1877, 1893 (1999) ("[T]he cultural assignment to women of the primary responsibility for nurturing children and making a home undermines their performance in the market . . . . Women who are not caregivers may be adversely affected as well, because employers will assume that their attachment to the waged labor market is secondary.").

[53] Felice N. Schwartz, BREAKING WITH TRADITION: WOMEN AND WORK, THE NEW FACTS OF LIFE 9-26 (1992) (commenting that "even today, women sometimes are advised to remove their wedding rings when they interview for employment, presumably to avoid the inference that they will have children and not be serious about their careers"), *cited in* Williams & Segal, *supra* note 23, at 97; Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595, 631 n.124 (1993) (stating that "getting married itself is an act that sends out the wrong signal on this score [of commitment to the labor market] – that is, it does for women – and thus the evidence that married women hide their wedding rings prior to job interviews is not surprising").

[54] 42 U.S.C. § 2000e-3(m).

[55] *Id*. § 2000e-5(g)(2).

[56] *Back*, 365 F.3d at 120 ("it takes no special training to discern stereotyping in the view that a woman cannot 'be a good mother' and have a job that requires long hours, or in the statement that a mother who received tenure 'would not show the same level of commitment [she] had shown because [she] had little ones at home'").

[57] *See* Alice H. Eagly & Valerie J. Steffen, *Gender Stereotypes, Occupational Roles, and Beliefs About Part-Time Employees*, 10 PSYCH. WOMEN. Q. 252, 260-61 (1986) (finding that "[f]or women, part-time employment is generally associated with substantial domestic obligations, and female part-time employees are consequently perceived as similar to homemakers"). In contrast, part-time employment in men is associated with difficulty in finding full-time paid employment.

Courts are divided as to whether the practice of paying part-time workers at a lower hourly rate than full-time workers implicates the Equal Pay Act. *Compare Lovell v. BBNT Solutions, LLC*, 295 F. Supp. 2d 611, 620-21 (E.D. Va. 2003) (part-time female worker could compare herself with full-time male worker for purposes of establishing a prima facie case under the EPA), with *EEOC v. Altmeyer's Home Stores, Inc.*, 672 F. Supp. 201, 214 (W.D. Pa. 1987) (EEOC could not establish sex-based pay discrimination by comparing part-time worker with full-time worker). See also Section 10: *Compensation Discrimination*, § 10-IV F.2.h, EEOC Compliance Manual, Volume II (BNA) (2000).

[58] Employers may think that they are behaving considerately when they act on stereotypes that they believe correspond to characteristics that women should have, such as the belief that working mothers with young children should avoid extensive travel. *See KATHLEEN FUEGEN ET AL., Mothers and Fathers in the Workplace: How Gender and Parental Status Influence Judgments of Job-Related Competence*, 60 J. SOC. ISSUES 737, 751 (2004); Williams & Segal, supra note 23, at 95.

[59] *Lust*, 383 F.3d 580 (upholding jury's finding that employee was denied promotion based on sex where supervisor did not consider plaintiff for a promotion that would have required relocation to Chicago because she had children and he assumed that she would not want to move, even though she had never told him that and, in fact, had told him repeatedly that she was interested in a promotion despite the fact that there was no indication that a position would be available soon at her own office in Madison).

[60] *Cf. International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 199-200 (1991) (in rejecting employer policy that excluded fertile women from positions that would expose them to fetal hazards, the Court stated that the "beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination").

[61] *See Lettieri v. Equant Inc.*, 478 F.3d 640 (4th Cir. 2007) (evidence was sufficient for finder of fact to conclude that the plaintiff was denied a promotion because of discriminatory belief that women with children should not live away from home during the work week).

[62] *See Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 42, 59-61 (1st Cir. 1999) ("concept of 'stereotyping' includes not only simple beliefs such as 'women are not aggressive' but also a host of more subtle cognitive phenomena which can skew perceptions and judgments").

[63] See Amy J.C. Cuddy et al., *When Professionals Become Mothers, Warmth Doesn't Cut the Ice*, 60 J. SOC. ISSUES 701, 711 (2004) ("Not only are [working mothers] viewed as less competent and less worthy of training than their childless female counterparts, they are also viewed as less competent than they were before they had children. Merely adding a child caused people to view the woman as lower on traits such as capable and skillful, and decreased people's interest in training, hiring, and promoting her.").

[64] *See Back*, 365 F.3d at 115 (employer told employee that it was "not possible for [her] to be a good mother and have this job"); *Trezza v. Hartford, Inc.*, No. 98 CIV. 2205 (MBM), 1998 WL 912101, at *2 (S.D.N.Y. Dec. 30, 1998) (employer remarked to employee that, in attempting to balance career and motherhood, "I don't see how you can do either job well"); see also Cecilia L. Ridgeway & Shelley J. Correll, *Motherhood as a Status Characteristic*, 60 J. SOC. ISSUES 683, 690 (2004) (noting that while mothers are expected always to be "on call for their children," a worker is expected to be "unencumbered by competing demands and be always there for his or her employer").

[65] *See, e.g.*, Nicole Buonocore Porter, *Re-defining Superwoman: An Essay on Overcoming the "Maternal Wall" in the Legal Workplace*, 13 DUKE J. GENDER L. & POL'Y 55, 61-62 (Spring 2006).

[66] *See infra* § II.C.

[67] *See supra* § II.A.1.

[68] For information on protections under the Family and Medical Leave Act, see Compliance Assistance – Family and Medical Leave Act, http://www.dol.gov/esa/whd/fmla/.

[69] *International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 204 (1991).

[70] Title VII defines the terms "because of sex" or "on the basis of sex" as including "because of or on the basis of pregnancy, childbirth, or related medical conditions" and provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k).

[71] Some employers' improper pregnancy-related "inquiries" have even included pregnancy testing. *See, e.g., Justice Department Settles Pregnancy Discrimination Charges Against D.C. Fire Department*, U.S. FED. NEWS, Sept. 8, 2005, 2005 WLNR 14256220 (reporting on settlement between DOJ and District of Columbia regarding complaint that employment offers as emergency medical technicians were contingent on negative pregnancy test result and that technicians who became pregnant during first year of employment were threatened with termination).

[72] *See* EEOC Enforcement Guidance: *Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act*, Question 2 (2000), http://www.eeoc.gov/policy/docs/guidance-inquiries.html ("A 'medical examination' is a procedure or test that seeks information about an individual's physical or mental impairments or health.") (emphasis added). For information on the ADA's specific restrictions on the use of medical examinations, see 29 C.F.R. §§ 1630.13, .14 & Appendix to Part 1630.

[73] 29 C.F.R. Part 1604 Appendix, Question 5 (1978).

[74] *Cf. Troy v. Bay State Computer Group, Inc.*, 141 F.3d 378 (1st Cir. 1998).

[75] This document supersedes EEOC's *Policy Guidance on Parental Leave* (Aug. 27, 1990).

[76] *Hibbs*, 538 U.S. at 736.

[77] See Williams & Segal, *supra* note 23, at 101-02 (discussing stereotypes of men who take active role in childcare).

[78] For information on protections under the Family and Medical Leave Act, see Compliance Assistance – Family and Medical Leave Act, http://www.dol.gov/esa/whd/fmla/.

[79] *See California Fed. Sav. & Loan Ass'n v. Guerra*, 472 U.S. 272, 290 (1987) (upholding state pregnancy disability-leave statute requiring employers to provide leave for the period of time that a woman is physically disabled by pregnancy, childbirth, and related medical conditions).

[80] This period includes the postpartum period that a woman remains incapacitated as a result of having given birth. *See generally* Pat McGovern et al., *Postpartum Health of Employed Mothers 5 Weeks After Childbirth*, ANNALS OF FAMILY MEDICINE, Mar. 2006, at 159, *available at* http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1467019.

[81] *See* EEOC Compliance Manual: Race Discrimination, Volume II, § 15-IV, C, "Intersectional Discrimination" (2006), http://www.eeoc.gov/policy/docs/race-color.html#IVC.

[82] 42 U.S.C. § 12112(b)(4). Section 501 of the Rehabilitation Act provides the same protection to federal workers. 29 U.S.C. § 791(g) (incorporating ADA standards).

[83] *Abdel-Khalke v. Ernst & Young*, LLP, No. 97 CIV 4514 JGK, 1999 WL 190790 (S.D.N.Y. Apr. 7, 1999) (issues of fact regarding whether employer refused to hire applicant because of concern that she would take time off to care for her child with a disability).

[84] 29 U.S.C. § 1630.8 (ADA makes it unlawful for employer to "deny equal jobs or benefits to, or *otherwise discriminate against*," a worker based on his or her association with an individual with a disability) (emphasis added).

[85] 29 C.F.R. § 1604.11 (Sexual Harassment Guidelines); *EEOC Policy Guidance on Current Issues of Sexual Harassment* (Mar. 19, 1990) (sex-based harassment – harassment not involving sexual activity or language – may give rise to Title VII liability if it is "sufficiently patterned or pervasive"), http://www.eeoc.gov/policy/docs/currentissues.html.

[86] This example is based on *Walsh v. National Computer Systems, Inc.*, 332 F.3d 1150 (8th Cir. 2003) (upholding jury verdict that the plaintiff was subjected to a hostile work environment in violation of Title VII when she was harassed because she had been pregnant, taken pregnancy-related leave, and might become pregnant again).

[87] *E.g., Gallina v. Mintz, Levin, Cohn, Ferris, Glosky & Popeo, P.C.*, Nos. 03-1883, 03-1947, 2005 WL 240390 (4th Cir. Feb. 2, 2005) (unpublished) (plaintiff presented sufficient evidence for reasonable jury to conclude that she was denied a pay raise and terminated for complaining about harassment and other adverse conduct that began after the acting manager learned that the plaintiff had a small child).

[88] *See Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415 (2006) ("plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have "dissuaded a reasonable worker from making or supporting a charge of discrimination"'") (citations omitted).

[89] *Id.*